

# Work Product Doctrine

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# THE WORK PRODUCT DOCTRINE

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## INTRODUCTION

The work product doctrine, which protects trial preparation materials from discovery, is a doctrine of uncertain dimension.<sup>1</sup> The scope of protection the doctrine provides these materials is one of the "most controversial and vexing problems" in the Federal Rules of Civil Procedure.<sup>2</sup> Despite guidance provided by *Hickman v. Taylor*<sup>3</sup> and the partial codification of that case in Federal Rule of Civil Procedure 26(b)(3),<sup>4</sup>

<sup>1</sup> The protection afforded by the work product doctrine has been labeled a privilege, *see, e.g., In re Murphy*, 560 F.2d 326, 331 (8th Cir. 1977), a qualified immunity, *id.* at 344, and a quasi-privilege, Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Introduction*, 42 U. DET. L.J. 1, 3 (1964). To avoid confusion with the attorney-client privilege, this Note refers to the protection as "work product immunity." The work product doctrine is the conceptual framework supporting that immunity. *See also* *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 n.1 (N.D. Ohio 1953) ("The term, 'work product of the attorney', has been variously characterized a 'privilege,' 'exemption,' or 'immunity.' It matters little what terminology is employed, however, so long as it is understood that the phrase encompasses something apart from confidential communications between client and attorney.").

<sup>2</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 499 (1970); *see* *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733 (4th Cir. 1974) ("the most controversial problem in the discovery area"), *cert. denied*, 420 U.S. 997 (1975); Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1026 (1950); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1027 (1961) ("[u]ndoubtedly the most controversial problem in the discovery area") [hereinafter cited as *Developments*]; Annot., 35 A.L.R.3d 412, 422 (1971) ("[o]ne of the most controversial problems in the discovery area"); *see also* 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.63 (2d ed. 1983); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2021-27 (1970).

<sup>3</sup> 329 U.S. 495 (1947).

<sup>4</sup> *See* *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981). Federal Rule of Civil Procedure 26(b)(3) provides:

**Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Because *Hickman* covered intangibles as well as "documents and tangible things," *see infra* notes 485-88 and accompanying text, rule 26(b)(3) represents only a partial codification.

work product protection is the most frequently litigated discovery issue.<sup>5</sup> This Note presents a comprehensive summary of the work product doctrine in the federal courts,<sup>6</sup> emphasizing developments in the area since the adoption of rule 26(b)(3) in 1970.

One of the most significant features of the current work product doctrine is the coexistence of *Hickman* and rule 26(b)(3). A few initial observations about their relationship are necessary to prevent the mistaken and confusing view that they present identical standards. First, the two standards differ in scope. Rule 26(b)(3) is narrower than *Hickman* in that it applies only to "tangible" work product;<sup>7</sup> *Hickman* also protects "intangible" work product.<sup>8</sup> The rule is broader than *Hickman* in at least one respect. The rule protects the work product of nonattorneys, while *Hickman*, on its face, applies only to the work product of attorneys.<sup>9</sup> In addition, policy analysis is more important to the application of *Hickman*. *Hickman* created a flexible immunity for trial preparation materials bounded only by its policies. Proper application of the *Hickman* standard requires an understanding of those policies. Rule 26(b)(3), by preempting a large part of the doctrine's coverage as developed by *Hickman* and subsequent case law, limited the importance of policy analysis in determining the perimeters of the immunity.<sup>10</sup>

Section I of this Note discusses the development of the work product doctrine up to the adoption in 1970 of rule 26(b)(3), with particular emphasis on the milestone case of *Hickman v. Taylor*.<sup>11</sup> The rationales underlying the cases are considered, as well as attempts by succeeding generations of rulemakers to alleviate the problems in the Federal Rules. The historical development concludes with a restatement of the policies in defense of the doctrine that have been most durable.<sup>12</sup>

The exposition of the current work product doctrine in Sections II through IV continues the themes introduced in the history and policy section under three general headings: the types of work product,<sup>13</sup> the timing factors involved in work product,<sup>14</sup> and the personal aspects of the doctrine.<sup>15</sup> Section II distinguishes the four types of work product:

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<sup>5</sup> 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[1], at 26-343.

<sup>6</sup> Practice in state courts may vary from that in federal courts. This Note discusses only practice in federal courts.

<sup>7</sup> See *infra* notes 158-59 and accompanying text.

<sup>8</sup> See *infra* notes 113, 116-18 and accompanying text.

<sup>9</sup> See *infra* notes 647-69 and accompanying text.

<sup>10</sup> See *infra* notes 153-55 and accompanying text.

<sup>11</sup> See *infra* notes 29-162 and accompanying text.

<sup>12</sup> See *infra* notes 163-75 and accompanying text.

<sup>13</sup> See *infra* notes 176-496 and accompanying text.

<sup>14</sup> See *infra* notes 497-644 and accompanying text.

<sup>15</sup> See *infra* notes 645-815 and accompanying text.

facts,<sup>16</sup> ordinary work product,<sup>17</sup> opinion work product,<sup>18</sup> and legal theories.<sup>19</sup> Of these, only ordinary and opinion work product receive work product immunity. Section II also examines the specific exceptions to ordinary and opinion work product immunity.<sup>20</sup> A separate subsection addresses the difficult problem of intangible work product, not explicitly protected by rule 26(b)(3).<sup>21</sup>

Section III<sup>22</sup> examines the timing factors involved in the work product doctrine, with emphasis on rule 26(b)(3)'s requirement that work product must be prepared "in anticipation of litigation." Courts have misconstrued this requirement by denying protection to material in the ordinary course of business even though the material was also prepared in anticipation of litigation.<sup>23</sup> This Note criticizes this construction of the rule<sup>24</sup> and offers as an alternative a document-by-document analysis based on the doctrine's underlying policies. Section III also addresses another timing problem much litigated in recent years: the continued viability of work product immunity in litigation other than that for which the document was originally prepared.<sup>25</sup>

Section IV discusses who can create<sup>26</sup> and assert<sup>27</sup> work product immunity, and which actions will lead to a waiver of the protection.<sup>28</sup> These issues are of practical importance to the litigator, and provide an opportunity to examine the limits of the doctrine and the policies that underlie it.

## I

### HISTORY AND RATIONALE

#### A. History

Prior to the Supreme Court's decision in *Hickman v. Taylor*,<sup>29</sup> a work product doctrine had been developing slowly in response to changes imposed on the common law practice of discovery by the Federal Rules of Civil Procedure. While clearly enunciating the values of open discovery, *Hickman* provided a new focus for development of the doctrine by

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<sup>16</sup> See *infra* notes 184-91 and accompanying text.

<sup>17</sup> See *infra* notes 192-312 and accompanying text.

<sup>18</sup> See *infra* notes 344-423 and accompanying text.

<sup>19</sup> See *infra* notes 467-78 and accompanying text.

<sup>20</sup> See *infra* notes 313-43, 424-66 and accompanying text.

<sup>21</sup> See *infra* notes 479-96 and accompanying text.

<sup>22</sup> See *infra* notes 497-644 and accompanying text.

<sup>23</sup> See *infra* notes 497-579 and accompanying text.

<sup>24</sup> See *infra* notes 559-79 and accompanying text.

<sup>25</sup> See *infra* notes 580-625 and accompanying text.

<sup>26</sup> See *infra* notes 647-69 and accompanying text.

<sup>27</sup> See *infra* notes 670-729 and accompanying text.

<sup>28</sup> See *infra* notes 730-815 and accompanying text.

<sup>29</sup> 329 U.S. 495 (1947).

preserving a zone of privacy within which attorneys could work.<sup>30</sup> After *Hickman*, work product litigation revolved largely around the ambiguities left unresolved by that case. Although the 1970 amendments to the Federal Rules of Civil Procedure resolved some of these issues, rule 26(b)(3)'s partial codification of the doctrine created many new problems.<sup>31</sup>

### 1. *Focusing the Problem: The Story Before Hickman v. Taylor*

Expansion of the scope of discovery by the Federal Rules of Civil Procedure created tension between an attorney's obligation to his client and his duty to respond to discovery requests.<sup>32</sup> Courts developed the work product doctrine to ease this tension. Because his client's case was largely immune from discovery in American courts prior to the Federal Rules, an attorney had no need for a protective doctrine either at law or in equity.<sup>33</sup> The discovery devices at law were narrowly defined and of limited use,<sup>34</sup> and the primary equitable discovery device, the bill of discovery, did not permit disclosure of an adversary's case.<sup>35</sup>

Conflicts between an attorney's duty to court and client were not unknown in the common law, but they arose at trial during the presentation of evidence rather than out of pretrial discovery. The practice of testimonial compulsion, developed in the reign of Elizabeth I,<sup>36</sup> could force an attorney to choose between revealing damaging evidence ob-

<sup>30</sup> See *infra* notes 86-127, 165-75 and accompanying text.

<sup>31</sup> See *infra* notes 156-62 and accompanying text.

<sup>32</sup> See generally 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[3], at 26-354. Professors Moore and Lucas note that "[w]hile the problem of discovery of materials obtained or prepared in anticipation of litigation did not become an acute one in the United States until the adoption of the Federal Rules, it was nevertheless not an entirely new question." *Id.* Although several states already had liberal discovery procedures in place, the cases arising therefrom "seem to have been given almost no consideration by the federal courts in dealing with the problem." *Id.* at 26-355 (footnote omitted).

<sup>33</sup> See G. RACLAND, *DISCOVERY BEFORE TRIAL* (1932) (complete survey of pre-Federal Rules practice); see also 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.03; LaFrance, *Work-Product Discovery: A Critique*, 68 DICK. L. REV. 351, 353-59 (1964); Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937); *Developments*, *supra* note 2, at 946-51.

<sup>34</sup> For example, at law there was no right to examine witnesses or parties solely for discovery purposes. 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.03, at 26-74. The two devices for taking depositions in advance of trial were the *de bene esse*, Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 88, amended by Act of May 9, 1872, ch. 146, 17 Stat. 89, and the *dedimus potestatem*, Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 88. The former could be used only if the witness was or intended to be out of the country or otherwise unavailable for trial. 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.03[1], at 26-75. The latter device was available to prevent an injustice but could not be used "merely for discovery purposes." *Id.* at 26-78.

<sup>35</sup> A party could only obtain evidence that would support his own case, a distinction, no doubt, often difficult to maintain. See 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 1856-57 (McNaughton rev. ed. 1961). Professors Moore and Lucas call the bill of discovery "a most cumbersome proceeding." 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.03, at 26-82.

<sup>36</sup> See 8 J. WIGMORE, *supra* note 35, § 2290, at 543.

tained from his client, and wrongfully withholding the evidence to benefit that client. The attorney-client privilege addressed this problem by protecting communication between attorney and client. This privilege, which appeared as a "natural exception" to the general rule of testimonial compulsion,<sup>37</sup> allowed the attorney to learn his client's secrets without fear that he would be forced to divulge them on the witness stand.<sup>38</sup>

During the last half of the nineteenth century, when liberal discovery procedures were developing in England, the courts expanded professional privilege to include not only communications between attorney and client, but also materials prepared for trial, whether by the solicitor, his agents, or his client.<sup>39</sup> Although this approach influenced some American state courts,<sup>40</sup> it had no impact on the federal courts, which had not yet embraced liberal discovery.<sup>41</sup>

The adoption in 1937 of the Federal Rules of Civil Procedure<sup>42</sup> initiated a slow revolution in attitude toward pretrial discovery that led to the development of a work product doctrine in the United States. The merger of law and equity and the simplification of pleadings under the

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The original justification for the attorney-client privilege was the honor of the attorney, 8 J. WIGMORE, *supra* note 35, § 2290, at 543; see also Gardner, *Privilege and Discovery: Background and Development in English and American Law*, 53 GEO. L.J. 585, 601 (1965), and the need for secrecy, 8 J. WIGMORE, *supra* note 35, § 2290, at 543. In the late 1700s, however, the search for truth gradually became the more accepted justification. It was hoped that the protection of the privilege would encourage individuals to consult attorneys, a desirable goal given the important contribution attorneys make to the legal system's efficiency. Any minor loss of truth in individual cases, though regrettable, was balanced against this overall systemic justification. Because the privilege was an exception to the general rule of disclosure, it was "strictly construed within the narrowest possible limits consistent with the logic of the principle." *Id.* This notion of achieving "better justice" by modifying the behavior of a principal in the trial is important to the articulation of a work product policy. As this Note will show, the work product doctrine, however, is concerned primarily with the attorney's, not the client's, behavior. See *infra* notes 174-75 and accompanying text.

<sup>39</sup> In *Anderson v. Bank of British Columbia*, 2 L.R.-Ch. 644 (Ch. App. 1876), Sir George Jessel divided the modern English law of privilege into four parts: (1) communications from client to solicitor; (2) a solicitor's acts on his client's behalf, including information obtained from third parties; (3) information obtained through agents; and (4) information obtained by the client for the solicitor's use. See generally Gardner, *supra* note 38. Gardner indicates that the English narrowly construe the communications privilege but have expanded the trial preparations privilege because of the nature of the adversary system and the division of legal practice between barrister and solicitor. This division has prompted the use of the "case for counsel," a document which would be of tremendous value to an opponent if unprotected. *Id.* at 585 n.1.

<sup>40</sup> See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[3] (discussion of state cases).

<sup>41</sup> By narrowly construing the Conformity Act of 1872, § 914 Rev. Stat. (superseded by the Federal Rules in 1938), the Supreme Court spared federal courts from wrestling with the more liberal state discovery procedures. Otherwise, the Conformity Act, which required federal courts to follow state procedures, would have imposed state discovery rules on federal courts. See *Ex parte Fisk*, 113 U.S. 713 (1885); see also *Hanks Dental Ass'n v. International Tooth Crown Co.*, 194 U.S. 303 (1904).

<sup>42</sup> The Federal Rules were promulgated pursuant to the Rules Enabling Act, Ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (codified at 28 U.S.C. §§ 2071-72 (1976)).



Federal Rules greatly expanded the role of discovery.<sup>43</sup> Prior to enactment of the Federal Rules, the pleadings had served to formulate issues and develop facts.<sup>44</sup> Under the Federal Rules, discovery, not pleading, became the primary means of performing these tasks.<sup>45</sup> To accomplish this, the discovery rules included an array of devices unknown to common law.<sup>46</sup> As complete as this discovery scheme was, however, it did not include a mechanism for resolving conflicts similar to those addressed by the attorney-client privilege in evidentiary matters.

In the first years after enactment of the Federal Rules, the district courts frequently faced situations in which a party sought to prevent discovery of his trial preparation materials by invoking one or more provisions of the Rules.<sup>47</sup> One such provision was rule 30(b), which, as originally adopted in 1937, allowed a court to issue protective orders restricting discovery by oral deposition.<sup>48</sup> The 1937 rules also restricted discovery of documents under rule 34 by requiring a showing of "good

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<sup>43</sup> See *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

<sup>44</sup> *Id.* at 500. Pleadings also provided notice to opposing parties. *Id.*

<sup>45</sup> *Id.* at 501; see also Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942). Discovery may also encourage settlements. See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.02[2], at 26-77; *Developments, supra* note 2, at 945-46.

<sup>46</sup> The Federal Rules permit liberal use of depositions (rules 26-32), interrogatories (rule 33), and requests for admissions (rule 36). In addition, there are provisions for "discovery and production of documents and things for inspection, copying or photographing" (rule 34), and for physical and mental examinations (rule 35). Compare the common law devices, *supra* note 34.

<sup>47</sup> See FED. R. CIV. P. 30 advisory committee note, 5 F.R.D. 433, 457-59 (1946) (proposed amendment).

Accident reports and eyewitness statements were the trial preparation materials most commonly sought through discovery. See, e.g., *Stark v. American Dredging Co.*, 3 F.R.D. 300 (E.D. Pa. 1943) (accident report); *Matthies v. Peter F. Connolly Co.*, 2 F.R.D. 276 (E.D.N.Y. 1941); *Bough v. Lee (II)*, 29 F. Supp. 498 (S.D.N.Y. 1939) (insurance company's investigative report); *Kenealy v. Texas Co.*, 29 F. Supp. 502 (S.D.N.Y. 1939) (ship's log); *Murphy v. New York & Porto Rico S.S. Co.*, 27 F. Supp. 878 (S.D.N.Y. 1939) (ship's log).

<sup>48</sup> As originally adopted rule 30(b) read as follows:

(b) **Orders for the Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

The 1970 amendments to the Federal Rules shifted the provision for protection orders from rule 30(b) to rule 26(c). See *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487 (1970).

cause" before a court could order discovery.<sup>49</sup> The cases decided shortly after the passage of the Federal Rules usually focused on rule 30(b) protective orders or rule 34's "good cause" requirement.<sup>50</sup> With no clear directive in the Rules, the district courts rendered inconsistent results, deciding the cases under one of three general positions: (1) the Rules *require* production of trial preparation materials;<sup>51</sup> (2) the Rules *prohibit* production of trial preparation materials;<sup>52</sup> or (3) the Rules should be strictly interpreted to limit production of trial preparation materials even though the Rules do not absolutely prohibit their discovery.<sup>53</sup>

The cases requiring production of trial preparation materials<sup>54</sup> are the most consistent with the spirit of radical change that the Rules sought to engender. In the leading case, *Bough v. Lee*,<sup>55</sup> an attorney twice sought to obtain a protective order under rule 30(b)<sup>56</sup> to prevent

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<sup>49</sup> As originally adopted, rule 34 read as follows:

**Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.** Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 34 was completely redrafted in 1970. See *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 525-26 (1970).

<sup>50</sup> For examples of cases applying the 1937 version of rule 30(b) to materials arguably produced in preparation of litigation, see *Seligson v. Camp Westover*, 1 F.R.D. 733 (S.D.N.Y. 1941); *Bough v. Lee* (II), 29 F.Supp. 498 (S.D.N.Y. 1939). For examples of cases applying the 1937 version of rule 34 to requests for similar materials, see *Poppino v. Jones Store Co.*, 1 F.R.D. 215 (W.D. Mo. 1940); *Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286 (W.D. Va. 1940); *Kenealy v. Texas Co.*, 29 F. Supp. 502 (S.D.N.Y. 1939).

<sup>51</sup> See cases cited *infra* notes 58-61.

<sup>52</sup> See cases cited *infra* note 63. Many courts took this approach because they felt the attorney-client privilege applied. See cases cited *infra* note 66.

<sup>53</sup> See, e.g., *Poppino v. Jones Store Co.*, 1 F.R.D. 215 (W.D. Mo. 1940); *Kenealy v. Texas Co.*, 29 F. Supp. 502 (S.D.N.Y. 1939).

<sup>54</sup> See FED. R. CIV. P. 30 advisory committee note, 5 F.R.D. 433, 457 (1946) (proposed amendment).

<sup>55</sup> 28 F. Supp. 673 (S.D.N.Y. 1939); 29 F. Supp. 498 (S.D.N.Y. 1939).

<sup>56</sup> Litigation in connection with the case of *Bough v. Lee* generated two reported opinions discussing the application of rule 30(b) to materials which were arguably produced in preparation of litigation. In *Bough v. Lee* (I), 28 F. Supp. 673 (S.D.N.Y. 1939), the plaintiff sought to depose the defendant's insurer and obtain a subpoena duces tecum demanding that the insurer produce statements and photographs connected with the case. The defendant moved pursuant to rule 30(b) to prevent discovery of the statements and photographs, claiming privilege. The court refused to limit discovery and granted the plaintiff permission to apply for the subpoena. After attempts to discover the statements and photographs from the company failed, the plaintiff made a second attempt to obtain the materials, this time deposing the

discovery of statements and photographs taken by an investigating insurance company. The court read rule 30(b) narrowly to require either a "confidential relationship" or a "showing of" bad faith, oppression or unreasonableness" before finding materials privileged.<sup>57</sup> Neither of these conditions were found to be satisfied in *Bough*. Although the statements and photographs were arguably trial preparation materials, the court did not recognize them as falling within an inherently protected category, and further found that the materials were not protected by the attorney-client privilege.<sup>58</sup> Other cases, consistent with this spirit of liberal discovery, allowed discovery of attorney investigations,<sup>59</sup> communications between counsel for various parties,<sup>60</sup> and reports made by a party's employees in the regular course of business.<sup>61</sup> Generally, the decisions allowing discovery were "easy" cases in which the materials might be discoverable even under the protective work product doctrine

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insurer's counsel. *Bough v. Lee* (II), 29 F. Supp. 498 (S.D.N.Y. 1939). Again the defendant moved under rule 30(b) to limit discovery, and again the court ordered that the material be produced.

<sup>57</sup> 28 F. Supp. at 675.

<sup>58</sup> *Id.*; see also *Kulich v. Murray*, 28 F. Supp. 675, 676 (S.D.N.Y. 1939). Because of its approach, the court in *Bough*, never determines whether the materials deserve immunity. If only materials prepared by attorneys are protected, the answer clearly is no. Even if the doctrine does protect third-party investigators, however, other circumstances, could sway a modern court to allow discovery. For example, if the investigation was conducted shortly after the accident, a court might be more likely to allow discovery than if the investigation was remote in time from the date of the accident. See text *infra* at notes 268-80. Thus, even if the court had pursued the work product doctrine to its conclusion, it might have reached the same result: the materials were discoverable.

<sup>59</sup> See *Kane v. News Syndicate Co.*, 1 F.R.D. 738, 739 (S.D.N.Y. 1941).

<sup>60</sup> *Leach v. Greif Bros. Coop. Corp.*, 2 F.R.D. 444, 446 (S.D. Miss. 1942) (plaintiff's personal statement procured by plaintiff's representative and voluntarily delivered to defendant found not privileged when plaintiff sought discovery); *E.W. Bliss Co. v. Cold Metal Process Co.*, 1 F.R.D. 193, 195 (N.D. Ohio 1940) (communications between one party and counsel of another party or between plaintiff and other party or his attorney are not privileged).

<sup>61</sup> *Terrel v. Standard Oil Co.*, 9 Fed. R. Serv. (Callaghan) 599 (E.D. Pa. 1945) (accident reports discoverable); *Topolinsky v. Palmer*, 8 Fed. R. Serv. (Callaghan) 663 (S.D.N.Y. 1945) (railroad crew statements made in usual course of business discoverable); *Farr v. Delaware, L. & W.R.R.*, 8 Fed. R. Serv. (Callaghan) 642 (S.D.N.Y. 1944) (reports of officers and employees in connection with railroad accident discoverable, but not statement or other information acquired by or through direction of counsel preparing for trial); *Eiseman v. Pennsylvania R.R.*, 3 F.R.D. 338, 339-40 (E.D. Pa. 1944) (accident reports submitted in usual course of business by railroad employees discoverable); *Stark v. American Dredging Co.*, 3 F.R.D. 300, 302 (E.D. Pa. 1943) (accident report, not produced "solely as part of the preparation for trial" discoverable); *Kenealy v. Texas Co.*, 29 F. Supp. 502, 504 (S.D.N.Y. 1939) (ship's logs that would constitute evidence discoverable); *Murphy v. New York & Porto Rico S.S. Co.*, 27 F. Supp. 878, 879 (S.D.N.Y. 1939) (ship's log sought in case involving seaman's injury).

These cases cited in Federal Rule of Civil Procedure 30 advisory committee note, 5 F.R.D. 433, 457 (1946) (proposed amendment), helped define the "in anticipation of litigation" requirement and the "regular course of business" exception. See *infra* notes 533-79 and accompanying text. Of these cases, all but *Murphy* and *Topolinsky* distinguished between reports made in the regular course of business and materials produced in anticipation of litigation.

that has evolved since *Hickman*.<sup>62</sup>

The second group of cases provided authority for complete or near complete protection of at least some broad classes of trial preparation materials. The rationale most frequently invoked in these cases rested on the "unfairness of letting the other party, through discovery, obtain free of charge the material gathered or prepared by his adversary."<sup>63</sup> Although rule 30(b) made denial of discovery a matter of discretion,<sup>64</sup> many courts were inflexible in prohibiting the discovery of trial preparation materials.<sup>65</sup> A few courts reached the same inflexible result by including trial preparation materials within the protection of the attorney-client privilege.<sup>66</sup>

The third group of cases used the language of the Rules to limit discovery of trial preparation materials, without clearly denying discovery in all cases. Courts adhering to this position actively used rule 30(b)

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<sup>62</sup> For example, in *E.W. Bliss v. Cold Metal Process Co.*, 1 F.R.D. 193 (N.D. Ohio 1940), the court allowed the defendant to discover communications between counsel in a prior suit that was related to the case at bar. In *Leach v. Greif Bros. Coop. Corp.*, 2 F.R.D. 444, 446 (S.D. Miss. 1942), the plaintiff was allowed to discover a statement he had made to his own lawyer which his lawyer had delivered to the defendant. Discovery would probably be allowed in both these cases today—under the at-issue exception in *Bliss* and under the party-statement exception in *Leach*.

<sup>63</sup> FED. R. CIV. P. 30 advisory committee note, 5 F.R.D. 433, 458 (1946); see also *Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286, 289 (W.D. Va. 1940) ("[O]ne party should not be allowed to require another to make [that] which he might equally as well make for himself."); *Maryland v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213, 215 (D. Md. 1940) (unreasonable to require defendant's insurer to furnish investigation "free of cost" to adversary).

*McCarthy v. Palmer*, 29 F. Supp. 585 (E.D.N.Y. 1939), contains the classic statement of this position:

While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended.

*Id.* at 586. *McCarthy* has been extensively cited and quoted. See, e.g., *Courteau v. Interlake S.S. Co.*, 1 F.R.D. 525, 526 (W.D. Mich. 1941); *Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286, 289 (D. Md. 1940); *Piorkowski v. Socony Vacuum Oil Co.*, 1 F.R.D. 407, 408 (M.D. Pa. 1940).

<sup>64</sup> See, e.g., *Bough v. Lee (I)*, 28 F. Supp. 673, 675 (S.D.N.Y. 1939).

<sup>65</sup> See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[4], at 26-373.

<sup>66</sup> See *Sano Petroleum Corp. v. Shell Oil Co.*, 3 F.R.D. 467 (E.D.N.Y. 1944) (privilege not limited to what client tells attorney); *Farr v. Delaware, L. & W.R.R.*, 8 Fed. R. Serv. (Callaghan) 642 (S.D.N.Y. 1944) (information acquired by or through direction of counsel in furtherance of preparation for trial considered confidential); *Matthies v. Peter F. Connolly Co.*, 2 F.R.D. 276, 277-78 (E.D.N.Y. 1941) (statements taken by insurance company's attorney in preparation for trial privileged, but use of captain's statement for impeachment permissible).

To some extent, this attempt to identify work product immunity as a subset of the attorney-client privilege reflects the English treatment of the problem. The Supreme Court discussed the English practice in *Hickman*, 329 U.S. at 510 n.9. See also *supra* note 39 and accompanying text.

protective orders<sup>67</sup> and closely scrutinized the "good cause" and other requirements of rule 34.<sup>68</sup> In the leading case, *Kenealy v. Texas Co.*,<sup>69</sup> which denied discovery of statements of crew members following an accident on board a ship, the court analyzed three requirements of rule 34. First, rule 34's "good cause" requirement demanded "some adequate reason for the desired production and inspection."<sup>70</sup> Second, the rule required that the documents be "designated"<sup>71</sup> so they could "be identified with some reasonable degree of particularity [to avoid] a roving expedition of a promiscuous mass of documents . . ."<sup>72</sup> Third, rule 34 limited discovery to documents that contain material evidence.<sup>73</sup> Another case, *Poppino v. Jones Store Co.*,<sup>74</sup> added the further requirement that the discovery request allege that the documents are in the possession of the adversary.<sup>75</sup>

This split in the courts over the appropriate protection to be afforded trial preparation materials led the Advisory Committee to sug-

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<sup>67</sup> See *supra* note 48 and accompanying text.

<sup>68</sup> See *supra* note 49 and accompanying text.

<sup>69</sup> 29 F. Supp. 502 (S.D.N.Y. 1939). In *Kenealy*, the court noted that cases such as *Bough v. Lee* (I), 28 F. Supp. 673 (S.D.N.Y. 1939), and *Bough v. Lee* (II), 29 F. Supp. 498 (S.D.N.Y. 1939), which were to the contrary, were outside the spirit and letter of rule 34. See 29 F. Supp. at 504.

<sup>70</sup> 29 F. Supp. at 503.

<sup>71</sup> As originally adopted, rule 34 allowed a court to order discovery of "designated documents, papers, books, accounts, letters, photographs, objects, or tangible things." In 1945 the Advisory Committee chose not to propose altering the term "designated," even though it was often construed "with undue strictness." The Committee felt that the Supreme Court had already given the word a less confined meaning in *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 553-54 (1908), and *Brown v. United States*, 276 U.S. 134, 143 (1928). See FED. R. CIV. P. 34 advisory committee note, 5 F.R.D. 433, 463 (1946).

<sup>72</sup> 29 F. Supp. at 503.

<sup>73</sup> *Id.* at 503-04. As originally adopted, rule 34 restricted discovery to documents "which constitute or contain evidence material to any matter involved in the action." See *supra* note 49. *Kenealy* relied on this requirement to limit discovery of material which were arguably produced in anticipation of litigation. See also *Rose Silk Mills, Inc. v. Insurance Co. of N. Am.*, 29 F. Supp. 504 (S.D.N.Y. 1939) (companion case to *Kenealy*); *Fluxgold v. United States Lines Co.*, 29 F. Supp. 506 (S.D.N.Y. 1939) (same); *Bennett v. Waterman S.S. Corp.*, 29 F. Supp. 506 (S.D.N.Y. 1939) (same); cf. *Maryland v. Pan-American Bus Lines*, 1 F.R.D. 213, 215 (D. Md. 1940) (citing *Kenealy* in rule 26 discovery context, not rule 34).

Other courts limited discovery to admissible evidence and thus protected materials such as witness and party statements as inadmissible hearsay. See, e.g., *Condry v. Buckeye S.S. Co.*, 4 F.R.D. 310, 312 (W.D. Pa. 1945); *In re Citizens Cas. Co.*, 3 F.R.D. 171, 171-72 (S.D.N.Y. 1942); *Schweinert v. Insurance Co. of N. Am.*, 1 F.R.D. 247, 248 (S.D.N.Y. 1940); *Poppino v. Jones Store Co.*, 1 F.R.D. 215, 217 (W.D. Mo. 1940); *Maryland v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213, 215 (D. Md. 1940); *Gitto v. "Italia," Societa Anonima Di Navigazione Genova*, 31 F. Supp. 567, 567 (E.D.N.Y. 1940); *Bennett v. Waterman S.S. Corp.*, 29 F. Supp. 506, 507 (S.D.N.Y. 1939); *Fluxgold v. United States Lines Co.*, 29 F. Supp. 506, 506 (S.D.N.Y. 1939); *Rose Silk Mills, Inc. v. Insurance Co. of N. Am.*, 29 F. Supp. 504, 505 (S.D.N.Y. 1939); *Slydell v. Capital Transit Co.*, 1 F.R.D. 15 (D.D.C. 1939). But see 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[4], at 26-365 to -366 (view that discovery limited to admissible evidence "erroneous").

<sup>74</sup> 1 F.R.D. 215 (W.D. Mo. 1940).

<sup>75</sup> *Id.* at 218.

gest changes in the Rules.<sup>76</sup> In 1944, the Committee proposed an amendment to rule 30(b) that included specific reference to the availability of protective orders intended to prevent "inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial."<sup>77</sup> The Committee added that its proposal would not preclude all discovery of such materials;<sup>78</sup> rather, it would only "make certain" that the power to deny discovery in these cases existed.<sup>79</sup>

A second draft of the rule, proposed in 1945, retained the same language but included a more complete explanatory note.<sup>80</sup> The Committee pointed out the divergent approaches among the courts and admitted that the chief objection to the proposed amendment was that its failure to set a standard to guide judges in exercising their discretion might allow the judicial confusion to continue.<sup>81</sup> In apparent despair, the Committee concluded: "If members of the profession can formulate a general statement of the standard for exercise of discretion, the Committee will welcome it and give it careful consideration."<sup>82</sup>

By the time the final report was submitted in June of 1946, the Advisory Committee had agreed upon a formulation.<sup>83</sup> The Supreme

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<sup>76</sup> One change, adopted in 1946, eliminated inconsistencies between rule 34 and the other rules by reconciling the scope of discovery under rules 34 and 26(b). *See* FED. R. CIV. P. 34 advisory committee note, 5 F.R.D. 433, 463 (1946). Prior to 1946, rule 34 required that discoverable documents contain evidence "material to any matter involved in the action." The 1946 amendment replaced the quoted language with the words: "relating to any of the matters within the scope of the examination permitted by Rule 26(b)." Rule 34's materiality requirement had been employed in cases such as *Kenealy v. Texas Co.*, 29 F. Supp. 502 (S.D.N.Y. 1939), to restrict discovery of materials arguably produced in anticipation of litigation. Rule 26(b) was also amended in 1946 to clarify that certain materials inadmissible at trial were nevertheless discoverable. The following language was added to rule 26(b): "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26 advisory committee note, 5 F.R.D. 433, 453 (1946).

<sup>77</sup> ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 43 (1944) [hereinafter cited as ADVISORY COMMITTEE]. The original version of rule 30(b) referred only to oral depositions and did not mention trial preparation materials. *See supra* note 48.

<sup>78</sup> ADVISORY COMMITTEE, *supra* note 77, at 44.

<sup>79</sup> *Id.*

<sup>80</sup> ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 38-40 (1945) [hereinafter cited as ADVISORY COMMITTEE].

<sup>81</sup> *Id.* at 39.

<sup>82</sup> *Id.* at 39-40.

<sup>83</sup> ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 39-40 (1946) [hereinafter cited as ADVISORY COMMITTEE]. The committee proposed the addition to rule 30(b) of the following language, strikingly similar to the language of current rule 26(b)(3):

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied

Court, however, did not adopt the rule because it had by then granted certiorari in the case of *Hickman v. Taylor*.<sup>84</sup> Rather than adopt the proposed rule, the Court chose to articulate the standard of protection for work product in its forthcoming decision.<sup>85</sup>

## 2. Hickman v. Taylor

*Hickman v. Taylor*,<sup>86</sup> like many of the earlier work product cases, involved the discovery of interviews with witnesses to an accident. After the tugboat J. M. Taylor sank, killing five crew members, the tug owners' attorney conducted interviews with the survivors and other people who witnessed the sinking.<sup>87</sup> The attorney, Fortenbaugh, retained records of the interviews in three forms: (1) signed written statements from the interviews with survivors, (2) personal memoranda of interviews with certain witnesses, and (3) his unrecorded memories of the interviews with the remaining witnesses.<sup>88</sup>

The representatives of one deceased crew member, Norman E. Hickman, brought suit against the tug owners in federal district court. During discovery, the plaintiff submitted an interrogatory to obtain the

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that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

<sup>84</sup> 328 U.S. 876 (1946).

<sup>85</sup> See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 499 (1970); see also Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498, 507 (1958); Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 275 n.24 (1968).

<sup>86</sup> 4 F.R.D. 479 (E.D. Pa.), *rev'd*, 153 F.2d 212 (3d Cir. 1945), *cert. denied*, 327 U.S. 808, *vacating denial of cert.*, 328 U.S. 876 (1946), *aff'd on other grounds*, 329 U.S. 495 (1947).

<sup>87</sup> The Supreme Court summarized the circumstances behind the discovery request:

On February 7, 1943, the tug "J.M. Taylor" sank . . . [in] the Delaware River at Philadelphia. The accident was apparently unusual in nature, the cause of it still being unknown. Five of the nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm, of which respondent Fortenbaugh is a member, to defend them against potential suits by representatives of the deceased crew members . . .

A public hearing was held on March 4, 1943, before the United States Steamboat Inspectors, at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, Fortenbaugh privately interviewed the survivors and took statements from them with an eye toward the anticipated litigation; the survivors signed these statements on March 29. Fortenbaugh also interviewed other persons . . . and in some cases he made memoranda of what they told him.

329 U.S. at 498. The Supreme Court omitted some interesting details which appear in the district court opinion. Fortenbaugh's firm had been regularly representing the owners of the tug, the Taylor and Anderson partnership, "for a number of years though not upon any salary or general retainer basis." 4 F.R.D. at 481. Taylor and Anderson was a small firm without a claims department and "no employees regularly charged with the duty of making investigations of any kind." *Id.*

<sup>88</sup> 4 F.R.D. at 481.

statements in Fortenbaugh's possession.<sup>89</sup> The interrogatory asked whether such statements existed and instructed the defendant to "[a]ttach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."<sup>90</sup> The defendant refused to comply because the interrogatory called for "privileged matter obtained in preparation for litigation."<sup>91</sup>

The district court allowed discovery,<sup>92</sup> and when the defendant refused to produce the requested material, the court found the attorney and his clients guilty of contempt.<sup>93</sup>

On appeal,<sup>94</sup> the Third Circuit reversed the contempt convictions

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<sup>89</sup> *Id.* at 480.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 483. Although the court recognized that privilege was a limitation on discovery, it found privilege inapplicable in this case. *Id.* at 481-82. The court further denied any other limitations on discovery except those imposed in the individual discretion of the judge. Broadening prior statements on the issue, the court said, "[u]nless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked." *Id.* at 482 (quoting *Stark v. American Dredging Co.*, 3 F.R.D. 300, 302 (E.D. Pa. 1943)). The "guiding principle" of this decision to permit discovery was "the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process." 4 F.R.D. at 481.

Despite these broad generalities, the district court did not order the defense to produce all material exactly as demanded. Instead, the court ordered the production of all written statements signed by witnesses, and slightly tempered the discovery order as to the other materials. The defendant had the option of submitting the unsigned attorney's memoranda to the court for a ruling on which portions should be revealed to the plaintiff. *Id.* at 482-83. As to the completely unrecorded interviews, the court ordered production only of statements of fact learned through those interviews. *Id.* at 483.

The district court, in rejecting the privilege concept, still took a rather protective position. Even though it ultimately ordered discovery of witnesses' statements, the court emphasized that the company probably would have conducted interviews in an unexplained accident as serious as this even if there had been no possibility of liability. The court left open the possibility of protection for statements prepared solely in anticipation of litigation. *Id.* at 482.

In dealing with oral statements, the court allowed discovery of material facts learned from the interviews, but protected opinions expressed by the attorney in recording his impressions. *Id.* at 483. The court believed that Fortenbaugh's memoranda were substantially the same as the written statements, observing that "Fortenbaugh was acting primarily as an investigator." *Id.* at 482. In acting outside his role as litigator, Fortenbaugh had altered the status of his work. Significantly, the court added:

Of course, it may appear that the memoranda contain, in addition to facts, various matters which the plaintiff has no interest in or right to know. Discovery should not be abused to become an instrument for obtaining knowledge of the opponent's theories of the case or the opinions, impressions or the record of mental operations of his attorney.

*Id.*

<sup>93</sup> *Hickman v. Taylor*, 153 F.2d 212, 214 (3d Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947).

<sup>94</sup> *Hickman v. Taylor*, 153 F.2d 212 (3d Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947).



by extending the concept of privilege to encompass what it labeled the "work product of the lawyer."<sup>95</sup> The court recognized that the materials in question were obtained from third parties so they were not protected by the conventional attorney-client privilege.<sup>96</sup> The court suggested, however, that the attorney-client privilege, when applied to limit discovery under the Federal Rules, should be broader than the privilege used in the law of evidence to exclude testimony.<sup>97</sup> The court concluded that the policies supporting the attorney-client privilege, which were intended to encourage full disclosure by the client, required that the privilege protect work product from discovery.<sup>98</sup>

The court identified as protected "intangible things, the results of the lawyer's use of his tongue, his pen, and his head, for his client."<sup>99</sup> This concept was embraced by the rough term, "work product of the lawyer."<sup>100</sup> Despite these vague outlines, however, the court made clear that the privilege "comprehends the material asked for in the interrogatory . . . namely, memoranda of talks with witnesses, signed statements made by witnesses, [and] the lawyer's recollection of talks with witnesses"<sup>101</sup>—the three types of trial preparation materials involved in the case.

The Supreme Court affirmed the Third Circuit's denial of discovery but grounded its decision on a new work product doctrine that was more limited than the appeals court's extension of privilege.<sup>102</sup> Al-

<sup>95</sup> *Id.* at 223.

<sup>96</sup> *Id.* at 222.

<sup>97</sup> *Id.* at 222-23. The court was especially troubled by the difficulties that might ensue if work product were not protected from discovery and a witness under cross-examination made a statement inconsistent with a pretrial statement recorded by his attorney. *Id.* at 219-20. If the attorney were called upon to verify his report of the interview, he would become a witness against his own client.

<sup>98</sup> *Id.* at 222-23. The court noted that the policy of privilege is not for the convenience of the individual judge, lawyer, or client. It is rather to aid people who have lawsuits and prospective lawsuits. Those members of the public who have matters to be settled through lawyers and through litigation should be free to make full disclosure to their advisers and to have those advisers and other persons concerned in the litigation free to put their whole-souled efforts into the business while it is carried on.

*Id.* at 223 (footnotes omitted). The court noted that although the framers of the Canons of Ethics anticipated an attorney acting as advocate and witness for his client (§ 19 directs the attorney in such cases to "leave the trial of the case to other counsel" and "[e]xcept when essential to the ends of justice" to avoid testifying, *id.* at 220 n.11 (quoting CANONS OF ETHICS § 19)), the idea that a lawyer could be a witness against his client "must have seemed too remote a possibility to the framers of the Canons." 153 F.2d at 220. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (1979) (derived from Canon 19); *infra* note 239; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (Final Draft 1983); *infra* note 135.

<sup>99</sup> 153 F.2d at 223.

<sup>100</sup> *Id.* The Court found it reassuring that this "seems likewise to be about what is represented by the English law." *Id.*; see *supra* note 39 and accompanying text.

<sup>101</sup> 153 F.2d at 223.

<sup>102</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947). This placed the Court in agreement with

though it found no specific language to this effect in the rules,<sup>103</sup> the Court argued that the

attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.<sup>104</sup>

According to the Court, even the most liberal discovery theory could not justify "unwarranted inquiries into the files and the mental impressions of an attorney."<sup>105</sup> The Court denied that the Rules contemplated "so harsh and unwarranted a result" and refused to interpret them in such a fashion.<sup>106</sup> By limiting the scope of discovery in this way, the Court provided some protection for trial preparation materials but avoided invoking the inflexible protection of the attorney-client privilege. The result was a decision that left the possibility of work product discovery open, even while seeming to preclude it.

The Court assumed that the rulemakers did not want to alter "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."<sup>107</sup> Discovery of the type sought in *Hickman* would disturb an attorney's methods of functioning by invading the zone of privacy that a lawyer's work requires.<sup>108</sup> "Proper preparation of

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the Advisory Committee, which had also argued against invoking privilege. FED. R. CIV. P. 30 advisory committee note, 5 F.R.D. 433, 460 (1946) (proposed amendment).

<sup>103</sup> See *United States v. Nobles*, 422 U.S. 225, 245 (1975) (White, J., concurring).

<sup>104</sup> 329 U.S. at 510.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 514. The language of the Rules, however, seems to promote unrestricted discovery. The Court's opinion, which restrains discovery, is at odds with the tenor of the Rules. In this regard Professor Cleary has noted that

[t]he fact seems to be . . . that the Court was once more trapped by an apparently felt necessity of saving face by refusing to admit that a contingency had arisen which the rules had not foreseen or had dealt with improvidently. A court driven to critical scrutiny of its own rules occupies an ambiguous and embarrassing position, with no escape offered by the usual preference for judicial over legislative wisdom.

Cleary, *Hickman v. Jencks: Jurisprudence of the Adversary System*, 14 VAND. L. REV. 865, 866 (1961) (footnotes omitted).

<sup>107</sup> 329 U.S. at 511.

<sup>108</sup> Professor Cleary noted that

the broad base for the [*Hickman*] decision was that preserving effective participation by the lawyer in the processes of litigation is in the public interest, and that effective participation demands a large measure of privacy. Except for substituting privacy of the attorney in place of freedom of disclosure by the client as a means of insuring effective functioning of the lawyer, the base is exactly the one found for the attorney-client privilege.

Cleary, *supra* note 106, at 866-67 (footnotes omitted); see *supra* notes 34-41 and accompanying text.

a client's case demands that [the lawyer] assemble information, sift . . . the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."<sup>109</sup> This work falls outside the normal boundaries of discovery.

The Court believed that "the interests of the clients and the cause of justice would be poorly served"<sup>110</sup> by unrestricted violation of this zone of privacy. The Court's reasoning combined practical considerations with a concern for the attorney's privacy. If an attorney's trial preparations were freely discoverable, "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."<sup>111</sup> The Court, however, did not define sharp practices or elaborate on how inefficiency might enter the system.<sup>112</sup>

Although the Court held that work product is generally nondiscoverable, it recognized that a party could legitimately demand discovery of work product in certain circumstances. Considering these circumstances in the context of the *Hickman* case, the Court discerned differences between "written materials obtained or prepared by an adversary's counsel with an eye toward litigation" and "oral statements made by witnesses to [the attorney], whether . . . in the form of . . . mental impressions or memoranda."<sup>113</sup> The Court suggested that written materials are more likely to be discoverable than oral statements and

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<sup>109</sup> 329 U.S. at 511. The Court made the same point earlier in its opinion: "[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510-11. The use of phrases such as "undue and needless interference" and "certain degree of privacy," which seem to qualify the immunity, demonstrates that the Court was trying to avoid creating an inflexible protection.

The Court's zone of privacy justification does not emphasize the requirement that protected materials be produced by an attorney acting "in anticipation of litigation." Instead the Court speaks of the attorney's role within the "system of jurisprudence" and does not restrict the analysis to a litigation context. However, some language in the opinion, such as the phrase "an eye toward litigation," *id.* at 511, could suggest this narrower focus.

<sup>110</sup> *Id.* at 511.

<sup>111</sup> *Id.* The Court listed "the giving of legal advice" and "preparation of cases for trial" as two separate realms which would be affected by discovery of work product. Although the latter receives most attention because rule 26(b)(3) is limited to trial preparation materials, it is important to recognize the former as a component in the Court's analysis and as a component of a possibly wider rule. See also *supra* note 109.

<sup>112</sup> See *infra* text accompanying note 171.

<sup>113</sup> 329 U.S. at 511-12. This division of work product into written materials, memoranda, and mental impressions corresponds to the three types of work product sought in the case: signed statements, interview memoranda, and attorney recollection. See *supra* text accompanying note 88. They are also representative of the current division of the doctrine into ordinary work product, see *infra* notes 192-312 and accompanying text, opinion work product, see *infra* notes 344-423 and accompanying text, and intangibles, see *infra* notes 479-96 and accompanying text. The work product in *Hickman* does not cover the full universe of protected materials but does treat examples of each of the three major divisions.

stated that written materials are discoverable "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."<sup>114</sup> Discovery of such written materials might be appropriate in a variety of situations. For example, discovery might be allowed if the document is admissible in evidence, if it gives clues as to the existence or location of relevant facts, if it is useful for purposes of impeachment or corroboration, or if the witnesses interviewed are no longer available or only available with difficulty.<sup>115</sup>

Oral statements, on the other hand, are discoverable only in an unidentified "rare situation."<sup>116</sup> "[G]rave dangers of inaccuracy and untrustworthiness" and the undesirable consequences of converting the attorney from an officer of the court to an ordinary witness<sup>117</sup> argue in favor of this more stringent treatment of oral statements. Presumably these problems are not as serious with signed written materials because the witness has had a chance to attest to the accuracy of the statement. The Court recognized that this distinction between recorded and unrecorded statements might create a disincentive to record, but stressed that relevant and unprivileged facts held by an adversary, in whatever form, are always discoverable.<sup>118</sup>

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<sup>114</sup> 329 U.S. at 511.

<sup>115</sup> *Id.* These situations, drawn from the *Hickman* text, are not meant to be necessary and sufficient conditions, but merely suggestions of possibilities.

<sup>116</sup> *Id.* at 513.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

*Id.* at 507 (footnote omitted).

The petitioner in *Hickman* made an unsupported demand as of right and, therefore, was denied any of the materials sought. *Hickman* suggests, however, that the three classes of materials might have received disparate treatment if the petitioners had made an appropriate showing of need. The Court did not make clear precisely what level or type of need one would have to establish to permit discovery of each class of materials. According to the Court, although discovery of the written statements was technically possible, circumstances such as the existence of earlier statements might have precluded discovery. *Id.* at 512 (citing FED. R. CIV. P. 30(b)). The second category, the attorney's memoranda, would only be discoverable in a "rare" situation which the Court concluded was not present. *Id.* at 512-13. The third category, recollections of interviews, would be strongly protected except for the facts learned in those interviews. *Id.*

Had the plaintiff made the required showing, the Supreme Court's final resolution might not have differed significantly from that of the district court. See *supra* note 92. The principal difference is that the district court permitted discovery upon demand, while the Supreme Court required a strong showing of need, suggesting that the most important effect of *Hickman* was to shift the burden of discovery. All three courts shared a philosophy favorable to discovery. The district court followed the literal language of the Rules in favor of discovery. This position is similar to that adopted in cases such as *Bough v. Lee*. See *supra* notes 54-62 and

In his concurrence, Justice Jackson recognized that the adversary nature of the common law trial required the Court to set limits on discovery.<sup>119</sup> He noted that discovery has a long history as "one of the working tools of the legal profession."<sup>120</sup> "This background of custom and practice . . . assumed by those who wrote [the Rules] . . . should be [assumed] by those who apply them . . . . [N]othing in the tradition or practice of discovery up to the time of these Rules would have suggested that they would authorize such a practice as here proposed."<sup>121</sup> To permit discovery in *Hickman*, Jackson continued, would damage the adversary system: "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."<sup>122</sup> Allowing discovery would be "demoralizing to the Bar,"<sup>123</sup> and damaging to the "welfare and tone of the legal profession."<sup>124</sup> Jackson believed that the proposed discovery would primarily affect the legal profession.<sup>125</sup> He argued that attorneys are an indispensable part of our administration of justice because "[l]aw-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs."<sup>126</sup> On these grounds, Jackson would join the majority in denying discovery of all three types of work product involved in *Hickman*. Unlike the majority, however, Jackson advocated applying rule 34's "good cause" standard to determine whether to allow discovery of the signed statements, and would only deny such discovery because the petitioner had failed to show the requisite good cause.<sup>127</sup>

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accompanying text. The court of appeals solved the problem by providing absolute protection for work product. This position is also consistent with a number of pre-*Hickman* decision. See *supra* notes 63-66 and accompanying text. Finally, the Supreme Court created a balance more protective than the language of the Rules, but utilizing a more malleable and less protective standard than that of the court of appeals. Earlier courts that had adopted moderate positions, see *supra* notes 67-75 and accompanying text, were not able to shift the burden of discovery, as did the Supreme Court. Instead, they manipulated parts of the Rules to achieve a similar result.

<sup>119</sup> *Id.* at 516 (Jackson, J., concurring).

<sup>120</sup> *Id.* at 515.

<sup>121</sup> *Id.* at 518-19.

<sup>122</sup> *Id.* at 516.

<sup>123</sup> *Id.* Jackson also shared the Third Circuit's concern that such a practice might require an attorney to take the stand to defend the accuracy of his account of an interview with a witness which his adversary had obtained through discovery. *Id.* at 517; see *supra* note 97 and accompanying text.

<sup>124</sup> 329 U.S. at 515 (Jackson, J., concurring).

<sup>125</sup> *Id.* at 514-15.

<sup>126</sup> *Id.* at 515. A similar rationale, emphasizing the public's need for attorneys, supports the attorney-client privilege. See *supra* note 38. In that context, the purpose is to reassure the client; here it is to prevent demoralization of the attorney.

<sup>127</sup> 329 U.S. at 519. Jackson recognized, as did the majority, the possibility of different protective standards for different types of materials.

### 3. *After Hickman*

*Hickman v. Taylor* was a milestone in the history of the Federal Rules.<sup>128</sup> As a political decision, it helped the Rules gain further acceptance.<sup>129</sup> As a declaration of principles, it decisively undercut attempts to narrowly construe the scope of discovery.<sup>130</sup> But as an attempt to finally resolve the problem of the scope of work product immunity, it proved to be a source of much confusion, offering little specific guidance to the district courts.<sup>131</sup>

The facts of the *Hickman* case partly contributed to the conflicts in the lower courts. Although nonattorneys conduct many of the investigative interviews in preparation for trial, it was the defense attorney who conducted the interviews in *Hickman*. This, combined with the Court's emphasis on the special role of attorneys in the legal system,<sup>132</sup> suggested that the holding only applied to interviews and investigations conducted by attorneys. Many courts read *Hickman* to limit the doctrine in this way.<sup>133</sup> Other courts disagreed with this limitation, finding "no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and those obtained by others for the use of the party's trial counsel."<sup>134</sup>

The Court also left unclear what showing would be necessary to

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<sup>128</sup> See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[8], for a discussion of *Hickman*'s impact.

<sup>129</sup> Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1273 (1969).

<sup>130</sup> See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) ("The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.") (footnote omitted).

<sup>131</sup> Comment, *Attorney's Work Product Rule—An Area of Confusion*, 31 FORDHAM L. REV. 530 (1963) [hereinafter cited as Comment, *Attorney's Work Product*]; Comment, *The Work Product Doctrine in the State Courts*, 62 MICH. L. REV. 1199, 1202 (1964) ("[T]he lower federal courts have gone in every conceivable direction in applying the *Hickman* 'work product' doctrine.") (footnote omitted); see also *Viront v. Wheeling L.E. Ry.*, 10 F.R.D. 45, 47 (N.D. Ohio 1950) (*Hickman* opened "a veritable Pandora's box").

<sup>132</sup> See *supra* notes 104-14 and accompanying text.

<sup>133</sup> See, e.g., *Southern Ry. v. Campbell*, 309 F.2d 569, 572 (5th Cir. 1962) ("[S]tatements taken by a claim agent are not generally considered to be the 'work product of a lawyer in preparation for the defense.'"); *De Bruce v. Pennsylvania R.R.*, 6 F.R.D. 403, 404 (E.D. Pa. 1947) (*Hickman* limited to lawyers: "Throughout the opinion at every point at which occasion arose the Court explicitly stated that what was under review was discovery . . . of statements obtained by an attorney for his client in preparation for trial."); see also *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (applying rule 34 "good cause" requirement to avoid deciding whether written statements of claims agents were protected by *Hickman* work product doctrine).

<sup>134</sup> *Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950); see also 2A W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 652.2 (C. Wright ed. 1961); 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63[8]; Cleary, *supra* note 106, at 867-69; Comment, *Attorney's Work Product*, *supra* note 131, at 531. Gardner, critical of the *Allmont* decision, claims that the court of appeals "confused the client's agent with the attorney's agents, thus broadening the scope of the privilege." Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery (Part II)*, 42 U. DET. L.J. 253, 260 n.247 (1965).

overcome the protection of the work product doctrine.<sup>135</sup> The discovery of documents was already restricted by rule 34's "good cause" requirement,<sup>136</sup> but *Hickman* seemed to impose an additional requirement for writings further classified as work product.<sup>137</sup> Most, but not all, courts interpreted *Hickman* to impose a higher burden than "good cause."<sup>138</sup> One court referred to it as "very good cause."<sup>139</sup> A minority of courts, however, treated "good cause" and the *Hickman* standard as equivalents.<sup>140</sup>

<sup>135</sup> See *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324, 325 (S.D.N.Y. 1955) ("In the wake of *Hickman v. Taylor*, . . . the cases skew madly as to what constitutes good cause . . .") (citations omitted); Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery (Part I)*, 42 U. DET. L.J. 105, 151 (1964) ("[B]y reason of its simultaneous discussion of the term 'good cause' as set out in Rule 34, the Court left room for argument that the two categories of good cause coincide.") (footnote omitted).

<sup>136</sup> Rule 34's "good cause" requirement demanded a showing of need greater than the mere showing of relevance demanded of other discovery. See, e.g., *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921, 923 (4th Cir. 1962); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 59 (N.D. Ohio 1953) ("Rule [34] clearly contemplates that 'good cause' shall consist of something greater than a mere showing of relevancy."). Language in some district court decisions suggests that relevance and "good cause" are equivalent, but "special circumstances were present in each." *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921, 925 (4th Cir. 1962). *Guilford* points out that all courts of appeals that have rules on the subject agree that relevance is not equivalent to "good cause." *Id.* at 925.

Gardner interpreted rule 34 "good cause" to require only "that production would not be burdensome or oppressive to the opponent . . . . In fact, the philosophy of open discovery itself suggests that the purpose of the good cause requirement of Rule 34 was meant to be no more than a device to shift the burden of going forward to the proponent of production under court supervision." Gardner, *supra* note 135, at 152-53 (footnote omitted).

<sup>137</sup> But see *supra* note 127 and accompanying text.

<sup>138</sup> See *Burke v. United States*, 32 F.R.D. 213, 215 (E.D.N.Y. 1963) ("[T]he good cause requirement . . . obviously is less onerous than the showing . . . required by *Hickman*."); *Developments, supra* note 2, at 1033 n.702; Note, *Discovery: Work Product and Good Cause Development Since "Hickman v. Taylor,"* 36 IND. L.J. 186, 197-200 (1961).

<sup>139</sup> See *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 420 (D. Del. 1959).

<sup>140</sup> See, e.g., *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y. 1955).

When combined with the conflicting treatment of nonattorney work product, the difficulties with the "good cause" requirement presented a number of alternatives. A court which did not consider nonattorney work product immune under *Hickman* might allow discovery of both attorney and nonattorney work product under "good cause" alone, or it might require a higher showing for only the attorney work product. A court which included nonattorney work product within the work product immunity might require either "good cause" or a higher showing for both. A further permutation could appear among those courts that recognized nonattorney work product as protected, but felt that the additional considerations applicable only to attorneys required a flexible standard. Thus, the degree of attorney involvement in the nonattorney's work would determine where to set the threshold: the more attorney involvement, the higher the showing of need. Some courts which protected only attorney work product used a similarly flexible standard, requiring that the attorney act in his capacity as attorney and employ legal skills in the work for the work product immunity to apply. Thus, the more prosaic the work and the less legal skill involved, the more likely the trial preparation materials would be treated as outside the work product doctrine. See *Molloy v. Trawler Flying Cloud, Inc.*, 10 F.R.D. 158 (D. Mass. 1950); *United States v. Deere & Co.*, 9 F.R.D. 523 (D. Minn. 1949); *O'Neill v. United States*, 79 F. Supp. 827 (E.D. Pa. 1948), *rev'd on other grounds sub nom.* *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949) (work of attorneys

In 1953, the Advisory Committee proposed changes to the discovery rules to clarify the effect of *Hickman*.<sup>141</sup> A preliminary draft of the proposed amendments suggested alterations in rule 34, including elimination of the "good cause" requirement.<sup>142</sup> The Advisory Committee asserted that this amendment would "not affect the limitations set out in *Hickman v. Taylor* . . . as to examination of documents obtained in anticipation of litigation or in preparation for trial."<sup>143</sup> Although this did not help define the showing required by *Hickman*, the action of the Committee at least suggested that the "good cause" and *Hickman* standards were independent. A related change, proposed for rule 33,<sup>144</sup> permitted documents to be obtained in connection with interrogatories. These documents could be obtained without any showing of "good cause," although, presumably, such discovery was still subject to the *Hickman* doctrine.<sup>145</sup>

The final draft, presented in 1955, differed considerably from the preliminary proposal. The changes made between drafts were partly due to the stiff opposition the preliminary draft met from insurance counsel and railroad defense attorneys, groups with a strong interest in discouraging free discovery of accident reports.<sup>146</sup> The Advisory Committee eliminated the changes to rule 33<sup>147</sup> and significantly altered the amendment to rule 34.<sup>148</sup> The final draft reinstated "good cause" as a requirement for discovery of an opposing party's documents<sup>149</sup> but included in rule 34 an amendment authorizing production of documents via interrogatory, without court order.<sup>150</sup> In reference to the amend-

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serving as FBI agents not protected); *Newell v. Capital Transit Co.*, 7 F.R.D. 732, 734 (D.D.C. 1948) (work of member of bar acting as claims adjuster not protected when produced in course of business).

<sup>141</sup> The Committee's work is discussed in Tolman, *supra* note 85, at 509-15.

<sup>142</sup> ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 31-32 (1954) [hereinafter cited as ADVISORY COMMITTEE]. If the proposed amendment had been adopted, the only remaining difference between discovery of documents under rule 34 and other discovery would have been a requirement that rule 34 discovery proceed under court order. The Committee retained this distinction "because of the unusual nature of the discovery here authorized, such as entry on the land of the adversary and inspection of tangible property." *Id.* at 32.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 27.

<sup>145</sup> *Id.* at 27-28. This change would have clarified the relationship between rules 33 and 34. One major purpose of the changes proposed by the Committee was the integration of the mechanics of document production under rules 26, 33, and 34. *Id.* at 29-30 (advisory committee notes).

<sup>146</sup> Tolman, *supra* note 85, at 509.

<sup>147</sup> *Id.*

<sup>148</sup> ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 38-39 (1955) [hereinafter cited as ADVISORY COMMITTEE].

<sup>149</sup> *Id.*

<sup>150</sup> The amendment to rule 33, proposed in the preliminary draft, would have accom-



ment to rule 34, the Committee explained rather ambiguously that "documents which are within the protection of *Hickman v. Taylor* . . . and therefore not subject to discovery without a showing of necessity or justification, cannot be so obtained. [These documents] can be had only by court order for good cause shown under Rule 34(a)." <sup>151</sup> This passage left unclear whether the *Hickman* standard was "necessity or justification," "good cause" under rule 34(a), or both. The amendments were rejected. <sup>152</sup>

The extensive 1970 amendments to the Federal Rules focused on the problems of "good cause" and the degree of protection afforded the work product of nonattorneys. <sup>153</sup> The Advisory Committee solved the first problem by eliminating rule 34's "good cause" requirement. Instead of leaving the question of *Hickman*'s relevance to the Committee notes, a new rule 26(b)(3) purported to codify *Hickman*, <sup>154</sup> and to describe the showing *Hickman* required for discovery of trial preparation materials. <sup>155</sup> The rule settled the other major post-*Hickman* problem by unequivocally extending work product immunity to nonattorneys engaged in trial preparation.

Although the 1970 amendments clarified these issues, they also raised a new set of questions. <sup>156</sup> The new rule 26(b)(3) generally protected documents and tangible things prepared in anticipation of litigation. In addition, however, the rule singled out for special protection

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plished the same end. See ADVISORY COMMITTEE, *supra* note 142, at 29-30. By including in rule 34 the provision allowing discovery of documents in connection with interrogatories, the Committee was able to integrate "all the devices for discovery of documents" in one rule. ADVISORY COMMITTEE, *supra* note 148, at 41.

Professor Moore objected to the liberalization process and filed a separate dissent. The discovery rules, according to Moore,

were the most revolutionary features of the Rules when promulgated, and some of their features still stir considerable controversy. In my opinion these Rules are basically sound and, on the whole, the courts have struck a fair and moderate balance in their application. I would leave that achievement alone for the present.

*Id.* at 8.

<sup>151</sup> ADVISORY COMMITTEE, *supra* note 148, at 40.

<sup>152</sup> 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.63(9). Professor Moore had dissented from the Advisory Committee Report. See ADVISORY COMMITTEE, *supra* note 148, at 6-8. He found the proposals "a zero. But a very perplexing and confusing zero." J. MOORE, MOORE'S FEDERAL RULES AND OFFICIAL FORMS 189-90 (1956); see Tolman, *supra* note 85, at 512-13 (discussion of opposition to proposals).

<sup>153</sup> See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 499 (1970).

<sup>154</sup> See *supra* note 4. Compare the text of the 1946 proposal, *supra* note 83.

<sup>155</sup> Changes in the discovery rules, including their rearrangement, are discussed in *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487-91 (1970).

<sup>156</sup> The "good cause" requirement had been a source of flexibility as well as confusion and conflict. Although the amorphous quality of the requirement lessened predictability, it allowed judges to consider the equities in the situations before them. Once the "good cause" requirement was eliminated, lawyers and judges turned to other aspects of the work product doctrine to provide flexibility.

"opinion work product": the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative of the client.<sup>157</sup> This added protection suggested the existence of some ill-defined bifurcation within the rule. Also, the rule's limited application to "documents and tangible things" suggested a different standard for oral statements and other intangible work product.<sup>158</sup> Commentators disagreed on the implication of this limitation.<sup>159</sup> The new rule explicitly restricted its scope to materials prepared "in anticipation of litigation," adding new emphasis to the problem of determining when "anticipation" begins. The use of materials in subsequent litigation further focused attention on the import of this language.<sup>160</sup> Other issues, perhaps not reached in previous litigation because of the inchoate nature of the *Hickman* doctrine, concerned waiver<sup>161</sup> and the ownership of the immunity.<sup>162</sup>

These and other problems have been the subject of litigation in the wake of the 1970 amendments. However, before turning to a consideration of the courts' solutions to these problems under rule 26(b)(3), it is useful to re-examine the policy justifications that have emerged from the historical development of the doctrine.

#### B. Rationale for the Work Product Doctrine

Understanding the broad goals of the work product doctrine is particularly important because rule 26(b)(3) codifies only part of the doctrine. Appreciating the goals enables one to judge how well the codification conforms to the policies underlying work product immunity. The manner in which the rule departs from these policies may indicate a need for reform or more flexible interpretation of the rule. Understanding the interplay between the rule and the underlying policies can also help resolve those difficult cases in which the language of the rule is susceptible to more than one reading. Finally, and perhaps most significantly, because the codification does not encompass the entire doctrine, many significant work product problems exist to which the rule does not apply. To resolve these problems, one must examine the policies that support the doctrine as a whole.

The central justification for the work product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role. Any invasion of this privacy could distort or modify the

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<sup>157</sup> See *supra* notes 4, 155.

<sup>158</sup> See *infra* notes 479-96 and accompanying text.

<sup>159</sup> See Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1068 (1979) (discussing conflicting views of Professors Wright and Miller and Professor Moore).

<sup>160</sup> See *infra* notes 580-625 and accompanying text.

<sup>161</sup> See *infra* notes 730-815 and accompanying text.

<sup>162</sup> See *infra* notes 670-73, 685-716 and accompanying text.

attorney's function to the detriment of the adversary system. Commentators and courts agree that the function of work product immunity is to preserve the benefits of adverse representation without frustrating the goals of open discovery.<sup>163</sup> A secondary rationale, sometimes proposed as an independent justification for the doctrine, emphasizes the need to protect the privacy of the attorney's mental processes.<sup>164</sup>

The adversary system operates on the assumption that "[n]o single advocate [or investigator] can perform equally well for several rivals."<sup>165</sup> Each party, therefore, has responsibility for presenting its own arguments. By placing the burden of representation on the parties themselves, the adversary system fosters a competitive relationship that motivates each party to marshal all the law and facts beneficial to its case. The system of open discovery dulls the competitive relationship that encourages attorneys to develop legal theories and facts. Without work product immunity, an attorney or investigator who senses that his efforts might benefit his opponent more than his client could be deterred from conducting thorough research. The work product doctrine, however, revitalizes the competitive relationship by creating a zone of privacy within which the attorney or investigator may work relatively free of the fear that his efforts will be discoverable.<sup>166</sup> The zone of privacy, which allows unfettered investigation, thus permits a greater degree of freedom to develop facts and theories.<sup>167</sup>

<sup>163</sup> See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("[W]ork product . . . looks to the vitality of the adversary system . . ."); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) ("[T]he work product privilege . . . exist[s] . . . to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.") (emphasis omitted); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (purpose is "to protect the adversary trial process itself"); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802 (3d Cir. 1979) ("overriding purpose . . . is . . . to encourage proper functioning of the adversary system"); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 482-83 (4th Cir. 1973) ("[T]he integrity of the adversary process must be safeguarded in spite of the desirability of the free interchange of information before trial."); *Developments, supra* note 2, at 1028-29; Note, *supra* note 85, at 275.

<sup>164</sup> See, e.g., *Developments, supra* note 2, at 1027-28.

<sup>165</sup> W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 4-5 (1968); see also *United States v. AT&T*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) ("[P]romotion of adversary preparation ultimately furthers the truth-finding process.") (emphasis omitted).

<sup>166</sup> See *In re Grand Jury Subpoena*, 622 F.2d 933, 935 (6th Cir. 1980); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980).

<sup>167</sup> See *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) ("The primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party."); *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 419 (D. Del. 1959) ("broad policy that a lawyer . . . should not be hampered by the knowledge that he may be called upon . . . to hand over the results of his work to his opponent"); see also *Bifferato v. States Marine Corp.*, 11 F.R.D. 44, 46 (S.D.N.Y. 1951); *Developments, supra* note 2, at 1029 ("[I]f the efficacy of trial preparation is undermined by the fear that the materials may be subject to discovery, the ultimate purpose of discovery itself may be frustrated.").

The zone of privacy also removes serious disincentives to thorough preparation. To maximize the facts available in a case, an attorney must be committed to developing those facts. An attorney who hopes to take advantage of his opponent's diligence will lack this commitment. Absence of a work product doctrine would encourage laziness and a "wait and see" attitude.<sup>168</sup> If an attorney hopes to obtain crucial information at his opponent's expense, he may feel no need to expend the effort or resources to do the research independently. This lack of preparation can have two negative effects. First, the attorney may be so ill-prepared that he is unable to make intelligent use of the discovery upon which he now depends. Second, he may be responsible for the loss of significant facts favorable to his side which were not developed by the opposition, and hence will never be unearthed.

Attorney laziness also discourages thorough preparation by the "lazy" attorney's opponent, who, knowing his adversary is doing a less than adequate job, may be satisfied with doing only a slightly better job himself. The attorney's unwillingness to work for his opponent, and his impression that the opposition presents little challenge, encourages this reaction.

Free discovery of trial preparation materials may create inefficiency in other ways as well. It has been suggested that attorneys, hoping to avoid discovery, will not record reports and information which would otherwise be recorded, thereby making trial preparation less efficient.<sup>169</sup> This view assumes that considerably fewer similar disincentives exist under the work product doctrine. An attorney's failure to keep accurate records does not affect the size of the fact pool as much as the attorney's ability to remember what has been added to that pool. Although a forgotten fact is as useless to the judicial process as one never discovered, it seems unlikely that this side effect of free discovery would be very significant. It remains only a secondary consideration.<sup>170</sup>

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<sup>168</sup> *Developments, supra* note 2, at 1029; *see, e.g., Kagan v. Langer Transp. Corp.*, 43 F.R.D. 404, 405 (S.D.N.Y. 1967) ("[R]equiring production of such attorney's work product would . . . destroy counsel's incentive diligently to prepare for trial and to carry out his professional duties, since otherwise he could, merely by sitting back and doing nothing, avail himself of the work product and professional diligence of counsel for the other side."); *see also supra* note 63 and accompanying text.

<sup>169</sup> *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 846 (8th Cir. 1973); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 930 (N.D. Cal. 1976); *Developments, supra* note 2, at 1029.

<sup>170</sup> *Cooper, supra* note 129, at 1279, accords little weight to the argument that work product is needed to encourage written preparation. Professor Cooper is perhaps correct in his evaluation that such encouragement "adds little to the balance in deciding these issues, and probably should not be considered as a separate factor in approaching other specific problems, notwithstanding its inclusion in the *Hickman* opinion." *But see, e.g., Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) ("[c]ertainly less

Other reasons advanced in support of the work product doctrine are best analyzed for their consistency with the doctrine's central purpose: preserving effective adversary behavior for the good of the system. Two ideas advanced in the *Hickman* opinions are worth examining in this context.

First, the *Hickman* majority in the Supreme Court was concerned that broad discovery would result in "sharp practices."<sup>171</sup> "Sharp practices," such as submission of false statements or misleading memoranda in response to discovery requests, would doubtless disrupt the adversary system. However, no logical connection exists between "sharp practices" and open discovery. "Sharp practices" may occur in any discovery scheme. Their presence is more properly an argument for effective sanctions than a guide to employment of the work product doctrine.

The second idea is that protection of work product immunity is necessary to prevent attorneys from testifying against their clients.<sup>172</sup> At best, this is a make-weight argument. The problem is too narrow to justify a solution as far reaching as the work product doctrine and could easily be cured by a limited rule forbidding the use of these materials at trials, while still permitting their discovery.<sup>173</sup>

Even though the work product doctrine may appear to conflict with open discovery, the two are actually quite consistent. Ultimately, both serve the purposes of issue and fact development.<sup>174</sup> The consistency is difficult to perceive because open discovery serves those purposes in each individual case, while the work product doctrine influences the nature of the attorney's fact-finding efforts in general. The work product doctrine serves the purposes of open discovery by ensuring thorough preparation, a necessary precondition to meaningful discovery. Because the work product doctrine affects the entire judicial system, not individual cases, the courts should not allow disincentives to attorney

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work-product would be committed to paper, which might harm the quality of trial preparation"); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 932 (N.D. Cal. 1976) (interpreting *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975), to present view that "even the remote possibility that work product might come to light in exceptional circumstances would deter attorneys from freely recording their mental impressions and conclusions in a candid and dispassionate manner").

One commentator argues that "[d]eterrence of written preparation would seem to be a more realistic fear . . . with respect to a lawyer's mental impressions" than with witness statements. With witness statements there is a need to commit the witnesses to a specific story. This need alone should be sufficient to compel recordation. Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799, 808.

<sup>171</sup> See *supra* text accompanying notes 111-12; see also Cleary, *supra* note 106, at 869 ("[I]t is far from clear what the Court had in mind [when it used the term sharp practices]. Perhaps it feared that red herrings in the form of false statements or misleading briefs or memoranda might be inserted in the file for the purpose of misleading the opposition.").

<sup>172</sup> See Cleary, *supra* note 106, at 869-70; Cooper, *supra* note 129, at 1277.

<sup>173</sup> See Cooper, *supra* note 129, at 1278.

<sup>174</sup> *Developments, supra* note 2, at 1028.

preparation to infiltrate the system through ad hoc discovery that ignores the effect on attorneys in later cases. Serving justice by ordering discovery in one case may ultimately hinder it by discouraging attorney preparation in later cases.<sup>175</sup> To avoid sacrificing the long-term policies of the work product doctrine for the short-term benefit of increased information in the individual case, courts should view each order allowing discovery of work product as the enunciation of a rule for all similar situations.

## II

### THE TYPES OF WORK PRODUCT

#### A. Introduction

Work product immunity under *Hickman v. Taylor*<sup>176</sup> and rule 26(b)(3) provides varying degrees of protection for certain information or materials prepared for litigation<sup>177</sup> by an attorney or his representative.<sup>178</sup> The spectrum of potential subjects of discovery includes facts, ordinary work product, opinion work product, and legal theories. These

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<sup>175</sup> Although rule 26(b)(3) focuses on litigation, there is no reason to believe that the *Hickman* rationale is so limited. Arguably, the courts should protect a broader range of attorney work product. For instance, an attorney who prepares a memorandum on the strengths and weaknesses of a contract he has drawn up for a client might modify his handling of future memoranda if he knew such documents were routinely discoverable. The memorandum, if discovered, could provide some unforeseen adversary with insights into weaknesses that he had not detected on his own. The attorney may have an interest in protecting the method as well as the substance of his work. Under the present rules, he would be able to protect his memoranda under the attorney-client privilege, if applicable, or with a rule 26(c) protective order.

<sup>176</sup> 329 U.S. 495 (1947).

<sup>177</sup> See *infra* notes 497-625 and accompanying text (discussing "in anticipation of litigation" requirement).

<sup>178</sup> See *infra* notes 208-12 and accompanying text. The mechanics for invoking work product protection are similar whether discovery is sought via interrogatory (rule 33), request for admission (rule 36), or a request for the production of a document or thing (rule 34). In most cases, the party resisting discovery has 30 days in which to object to the request. FED. R. CIV. P. 33, 34, 36. An answering defendant, however, has 45 days after service of the summons and complaint within which to answer. *Id.* Objections must be specific and may be made to all or part of the discovery request. Once a party objects, it is up to the proponent of discovery to pursue the matter further. Rules 33 and 34 require that the discovering party move for an order compelling discovery pursuant to rule 37(a). Rule 36 requires the party who has requested the admissions to "move to determine the sufficiency of the . . . objections." FED. R. CIV. P. 36(a). The proponent of discovery then has the burden of overcoming the work product immunity. Depositions upon oral examination (rule 30) or written questions (rule 31) involve a similar process. A party may object to the questions propounded. The deposition rules also provide for the use of a subpoena duces tecum to obtain documents and things in the hands of the deponent. If the deponent is a party, rule 34 applies. If the deponent is a third party rule 45(d) applies. Rule 45(d) differs from rule 34 in allowing the individual only 10 days from when the subpoena is served to file a written objection to the discovery request. Only then may the party seeking discovery obtain the requested materials pursuant to a court order. A motion to obtain such a court order may be made at any time before or during the taking of the deposition and after giving notice to the deponent. FED. R. CIV. P. 45(d).

categories are arranged and discussed in this Note according to their logical relation to each other, and not according to the degree of work product protection afforded them under *Hickman* or rule 26(b)(3).

Facts, when segregated from other types of discoverable material, are not protected as work product.<sup>179</sup> Ordinary work product, however, contains more than just facts. For example, a written witness statement prepared for trial by an attorney contains facts in combination with other information. Although the facts are discoverable by interrogatory or deposition, rule 26(b)(3) protects ordinary work product materials.<sup>180</sup>

Another class of materials protected under 26(b)(3), opinion work product,<sup>181</sup> presents a clearer view of the attorney's thought processes than does ordinary work product, and therefore receives near absolute protection. Although some opinion work product materials, such as written trial strategy memoranda, may be clearly protected, opinion and ordinary work product are sometimes difficult to distinguish. For example, an interview memorandum or a memorandum based on a witness's oral statement may fall in this gray area; although they are essentially factual statements, they have been extensively filtered through a lawyer's thoughts and perceptions.<sup>182</sup>

Legal theories, the final category on the spectrum, are freely discoverable.<sup>183</sup> Legal theories are the kernel of opinion work product in much the same way that facts are the foundation of ordinary work product. In both cases, it is the attorney's thoughts, strategies, or perceptions built around the legal theories or facts that are protected as work product. Legal theories, like facts, may be excised from the protected work product document and discovered by interrogatory or deposition.

Rule 26(b)(3)'s codification of *Hickman* is not as clear and complete as the foregoing introduction may imply. The discussion that follows illuminates the problems. Among the troublesome areas discussed are the definitions and forms of ordinary and opinion work product, the degree of protection to be afforded these types of materials, and the level of protection provided intangibles or unrecorded work product. The discussion attempts to clarify these areas by reference to the policies underlying work product protection as well as authoritative sources.

## B. Facts

Work product immunity under rule 26(b)(3) does not prohibit discovery of facts contained in documents even though the documents

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<sup>179</sup> See *infra* notes 184-91 and accompanying text.

<sup>180</sup> See *infra* notes 192-212 and accompanying text.

<sup>181</sup> See *infra* notes 344-423 and accompanying text.

<sup>182</sup> See *infra* note 353.

<sup>183</sup> See *infra* notes 467-78 and accompanying text.

themselves may not be discoverable.<sup>184</sup> For example, facts contained in highly protected opinion work product are discoverable by interrogatory or deposition.<sup>185</sup> In this regard, the rule codifies *Hickman*, which did not prevent discovery of such facts.<sup>186</sup>

The policies underlying the Federal Rules' liberal discovery provisions also favor this treatment of facts. Rule 26(b)(1) defines the broad scope of discovery under the Federal Rules<sup>187</sup> and, together with the other discovery rules, provides an important vehicle for ascertaining facts and formulating, clarifying, and narrowing issues.<sup>188</sup> In *Hickman*, the Court argued for liberal discovery, maintaining that such discovery was essential to the proper functioning of the adversary system.<sup>189</sup> Interpreting rule 26(b)(3) to prohibit discovery of facts would limit the application of rule 26(b)(1) and thereby undermine the liberal discovery rules. Reconciling rule 26(b)(3) with other discovery rules, and with the purposes underlying liberal discovery, therefore requires that work product immunity not extend to facts.<sup>190</sup>

Furthermore, free discovery of facts serves the purposes of discovery

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<sup>184</sup> See 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2023, at 194 ("The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery."); see also *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 89 (W.D. Okla. 1980) (holding that plaintiff's interrogatories clearly sought unprotected facts); *Ford v. Phillips Elecs. Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979) (discovery not protected to extent witness's knowledge of relevant facts sought); *supra* notes 166-67 and accompanying text (work product doctrine intended to create zone of privacy in which attorneys will gather maximum facts). But cf. Note, *Work Product Protection for Compilations of Nonparty Documents: A Proposed Analysis*, 66 VA. L. REV. 1323, 1328 (1980) (compilation of data may be tangible thing protected by rule 26(b)(3)).

<sup>185</sup> See, e.g., *In re Murphy*, 560 F.2d 326, 336 n.20 (8th Cir. 1977) ("Under Rule 26(b)(3), any relevant facts contained in non-discoverable opinion work product are discoverable upon a proper showing.").

<sup>186</sup> See *Hickman v. Taylor*, 329 U.S. 495, 511-13 (1947); see also FED. R. CIV. P. 26(b)(3) advisory committee note, 48 F.R.D. 487, 501 (1970) ("No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable."); *supra* note 118 and accompanying text.

<sup>187</sup> Federal Rule of Civil Procedure 26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

<sup>188</sup> See *supra* notes 45, 174 and accompanying text.

<sup>189</sup> The *Hickman* court noted that "the deposition-discovery rules are to be accorded a broad and liberal treatment. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." 329 U.S. at 507; see also *supra* note 130 and accompanying text.

<sup>190</sup> Moreover, facts and other discoverable data are not opinion work product protected by rule 26(b)(3). See *In re Murphy*, 560 F.2d 326, 336 n.20 (8th Cir. 1977).



with little, if any, negative effect on the attorney's adversary function.<sup>191</sup> Facts are discoverable only after the discovering attorney has done the work the adversary system seeks to encourage: the isolation of issues and recognition of relevant facts. An interrogatory that requests specific data shows that the attorney has already done his work. Insistence upon further independent research would simply misallocate attorney resources.

### C. Ordinary Work Product

#### 1. *Definition and Scope of "Ordinary" or "Shell" Work Product*

In *Hickman v. Taylor*,<sup>192</sup> the Third Circuit coined the term "work product of the lawyer."<sup>193</sup> The Supreme Court adopted the Third Circuit's language, stating that an attorney's work "is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . as the 'work product of the lawyer.'"<sup>194</sup>

Courts and commentators divide these forms of work product into the categories implicitly suggested in *Hickman*:<sup>195</sup> ordinary ("shell") work product and opinion ("core") work product.<sup>196</sup> Rule 26(b)(3) re-

<sup>191</sup> [T]he basic thrust of *Hickman* and its progeny is that documents containing the work product of attorneys which contain the attorneys' thoughts, impressions, views, strategy, conclusions and other similar information produced by the attorney in anticipation of litigation are to be protected when feasible, but not at the expense of hiding the non-privileged facts from adversaries or the court. Both sides of a suit need to know the facts in order to properly present their case to a court; and the court needs to know the facts in order to make a sound and intelligent decision.

*Xerox Corp. v. IBM*, 64 F.R.D. 367, 381 (S.D.N.Y. 1974); see also F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.10, at 198 (2d ed. 1977) ("A conflict of purpose is therefore presented between allowing full pretrial discovery and protecting the integrity of adversary competition. . . . [W]hile it is appropriate to make 'the facts' available to all parties, it is inappropriate to require an attorney to 'open his files' to an opponent.").

<sup>192</sup> 153 F.2d 212 (3d Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947).

<sup>193</sup> 153 F.2d at 223. In prohibiting discovery of interview memoranda, witness statements, and "the lawyer's recollection of talks with witnesses," the Third Circuit noted that "here we are dealing with intangible things, the results of the lawyer's use of his tongue, his pen, and his head, for his client. This was talked about as the 'work product of the lawyer' in the argument of the case." *Id.*

<sup>194</sup> *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

<sup>195</sup> The Court recognized two types of work product: "written materials obtained or prepared by an adversary's counsel with an eye toward litigation," *id.* at 511, and "oral statements made by witnesses to [the lawyer], whether presently in the form of [the lawyer's] mental impressions or memoranda," *id.* at 512. The Court then held that a qualified immunity protected written trial preparation materials (now labelled tangible ordinary work product) from discovery, while a stricter immunity protected oral or written work product reflecting an attorney's mental impressions (now termed opinion work product). *Id.*

<sup>196</sup> See, e.g., *In re Doe*, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981) (Ordinary work product "refer[s] to those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney. 'Opinion work product' is work product

tains this distinction,<sup>197</sup> stating:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.<sup>198</sup>

A literal interpretation of rule 26(b)(3) requires that three tests be satisfied before materials can be classified as work product. The materials must be:

1. 'documents and tangible things;'
2. 'prepared in anticipation of litigation or for trial; and'
3. 'by or for another party or by or for that other party's representative.'<sup>199</sup>

The 26(b)(3) formula can be problematic because it denies work product protection to "intangibles" or unrecorded work product.<sup>200</sup> How-

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that contains those fruits of the attorney's mental processes."), *cert. denied*, 455 U.S. 1000 (1982); *see also* Cooper, *supra* note 129, at 1295 (arguing that trial or adversary strategy is "hard core" of work product doctrine); Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1155 (1971) (referring to "highly immune category" of lawyer's mental impressions as "hard-core" work product).

<sup>197</sup> *See, e.g., In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977) ("The rule establishes a qualified immunity for ordinary work product—that which does not contain the mental impressions, conclusions or opinions of the attorney. . . . Rule 26(b)(3) provides special protection for an attorney's opinion work product."); *United States v. Bonnell*, 483 F. Supp. 1070, 1078 (D. Minn. 1979) (noting that *Hickman* implicitly created classifications of "ordinary" and "opinion" work product and implying that rule 26(b)(3) maintains distinction); *see also* Note, *Discovering Investigative Reports Under the Work Product Doctrine*, 34 BAYLOR L. REV. 156, 158-59 (1982) (differentiating between "core" work product, consisting of "evaluative materials prepared by an attorney or his agent," and "shell" work product, including "all other documents and tangible things prepared in anticipation of litigation not encompassed within the 'core' work product category") (footnote omitted) [hereinafter cited as Note, *Discovering Investigative Reports*]; Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 333 (1978) (describing opinion work product as "core" of work product) [hereinafter cited as Note, *Protection*].

<sup>198</sup> FED. R. CIV. P. 26(b)(3). Only documents and tangible things that are relevant to the subject matter in the pending action are discoverable. FED. R. CIV. P. 26(b)(1). Rule 26(b)(1) requires a flexible treatment of relevance for purposes of discovery. *See* FED. R. CIV. P. 26(b)(1) advisory committee note, 48 F.R.D. 487, 498 (1970).

<sup>199</sup> 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 196-97; *see also* Augenti v. Cappelini, 84 F.R.D. 73, 79 (M.D. Pa. 1979) (citing C. WRIGHT & A. MILLER, *supra* note 2).

<sup>200</sup> *See infra* notes 479-96 and accompanying text.

ever, the formula accurately reflects the factors most courts use in classifying materials as work product.<sup>201</sup> The rule distinguishes ordinary from opinion work product by implication only; all materials not deemed opinion work product, that is, not containing the mental impressions, conclusions, or opinions of the lawyer, are ordinary work product.<sup>202</sup> Because rule 26(b)(3) fails to specify what types of "documents and tangible things" may contain ordinary work product, courts are left with the task of defining which "documents and tangible things" constitute ordinary work product.

One example of ordinary work product is a witness statement taken in anticipation of litigation. Prior to the adoption of rule 26(b)(3), courts disagreed on the degree of protection afforded to such statements. Some courts suggested that witness statements, even those taken by an attorney, were not protected as work product.<sup>203</sup> Those courts providing protection<sup>204</sup> divided over whether the work product doctrine shielded statements obtained by claims agents or investigators.<sup>205</sup> Courts often denied work product protection unless the materials reflected the training, skill, and knowledge of a lawyer.<sup>206</sup> Similarly, some pre-amendment cases held that witness statements prepared for litiga-

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<sup>201</sup> See, e.g., *Augenti v. Cappellini*, 84 F.R.D. 73, 79 (M.D. Pa. 1979).

<sup>202</sup> See *supra* notes 196-97 and accompanying text.

<sup>203</sup> See *Caruso v. Moore-McCormack Lines, Inc.*, 196 F. Supp. 675, 676 (E.D.N.Y. 1961) (statement of witness taken by attorney not clothed in mantle of work product); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58-59 (N.D. Ohio 1953) (per curiam) (holding that written witness statements, whether prepared by witness, or drafted by attorney and adopted by witness, are not "work product" because they record mental impressions and observations of witness himself and not those of attorney).

Decisions holding that witness statements are not work product clearly conflict with *Hickman v. Taylor*, 329 U.S. 495 (1947). In *Hickman*, the Court invoked the work product doctrine to protect both written witness statements and oral witness statements made to the attorney, whether in the form of the attorney's mental impressions or in interview memoranda. *Id.* at 511-12; see also *supra* notes 132-34, 195 and accompanying text.

<sup>204</sup> See, e.g., *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (per curiam) (attorney's memoranda of debriefing interviews with grand jury witnesses qualified as work product even though attorney acted primarily as investigator), *aff'd mem. by equally divided court*, 400 U.S. 348 (1971); *City of Philadelphia v. Westinghouse Elec. Corp.*, 32 F.R.D. 350, 351 (E.D. Pa. 1962) (holding that witness statement tape recorded by attorney was work product).

<sup>205</sup> See generally *infra* notes 647-69 and accompanying text. Compare *Alltmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949) (witness statements secured by FBI agents investigating maritime accident held work product on theory that work product doctrine should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), *cert. denied*, 339 U.S. 967 (1950) with *Southern Ry. v. Campbell*, 309 F.2d 569, 572 (5th Cir. 1962) (statements taken immediately after accident by claim agents not work product). Similarly, the district courts were divided on witness statements obtained by claim agents, investigators and insurers. See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 202-03 ("Prior to 1970 the principal controversy about what type of material was within the work product protection was whether the protection extended only to materials prepared or obtained by a lawyer or whether it also reached trial preparation materials prepared by others.").

<sup>206</sup> See, e.g., *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 420

tion or trial by a party were not work product.<sup>207</sup> Rule 26(b)(3) settled the conflicts by extending protection to written witness statements and abolishing any distinction between trial preparation materials prepared by lawyers and nonlawyers.<sup>208</sup> Thus, work product under rule 26(b)(3) includes witness statements<sup>209</sup> prepared by an attorney or an investiga-

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(D. Del. 1959) (work product doctrine "applies only to matters obtained or produced by the lawyer through work which involves his professional skill and experience").

<sup>207</sup> See, e.g., *Groover, Christie & Merritt v. LoBianco*, 336 F.2d 969, 972-73 (D.C. Cir. 1964) (defendant's memorandum of witness interviews compiled shortly after death of his patient not work product).

<sup>208</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970), states that "[rule 26](b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf."

<sup>209</sup> See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501-02 (1970). There are two kinds of witness statements. The Jencks Act, 18 U.S.C. § 3500(e) (1976), aptly describes the first:

(e) The term "statement," as used . . . in relation to any witness . . . means

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

The first kind of witness statement generates the majority of work product litigation. *Cooper*, *supra* note 129, at 1318.

The second type of witness statement consists of interview memoranda or memoranda based on witnesses' oral statements. Rule 26(b)(3) more readily protects these witness statements because they usually contain an attorney's mental impressions, conclusions, opinions, or legal theories. See *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (holding that rule 26(b)(3) grants special protection to work product revealing attorney's mental processes, such as interview memoranda). For a discussion of the work product protection given interview memoranda, see *infra* note 351 and accompanying text.

Courts have extended the work product doctrine to protect witness statements in criminal proceedings. See *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (investigator's report protected in criminal trial until defense attorney waived protection by basing investigator's testimony on statements in report); Annot., 35 A.L.R.3d 412, 424 (1971); see also FED. R. CRIM. P. 16(b)(2) ("[T]his subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case"). The Court in *Nobles* held that rule 16 applies only to pretrial discovery. 422 U.S. at 235. Courts have also protected witness statements in grand jury proceedings. See, e.g., *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973) (personal recollections, notes, and memoranda pertaining to conversations with witnesses protected); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (notes of conversation with witness protected).

tor,<sup>210</sup> or by the witness or party himself.<sup>211</sup> Rule 26(b)(3) also applies to witness statements by government attorneys or agents.<sup>212</sup>

Investigative reports prepared in anticipation of litigation by an attorney, or by an investigator at the direction of an attorney, are work product under rule 26(b)(3).<sup>213</sup> For example, one court protected from a grand jury's subpoena duces tecum a financial analysis prepared by an accountant for a lawyer.<sup>214</sup> Similarly, rule 26(b)(3) safeguards investigative reports prepared by government attorneys or agents.<sup>215</sup>

Work product protection also extends to intraoffice memoranda,<sup>216</sup> including inter- and intra-agency memoranda of government agencies, if the memoranda are prepared in anticipation of litigation.<sup>217</sup> Litiga-

<sup>210</sup> See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 399-401 (1981) (rule 26(b)(3) protects interview memoranda compiled by company attorneys conducting internal investigation); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (witness statements in investigator's report were work product); *In re Grand Jury Investigation* (Sun), 599 F.2d 1224, 1233 (3d Cir. 1979) (questionnaires and interview memoranda prepared by corporate attorneys during internal investigation protected by work product doctrine).

<sup>211</sup> See, e.g., *Augenti v. Cappellini*, 84 F.R.D. 73, 79 (M.D. Pa. 1979) ("Traditionally, the work product of a lawyer in preparation for trial was not subject to discovery and Rule 26(b)(3) extends that immunity to work products not only of lawyers, but to documents prepared 'by or for a party.'") (emphasis in original).

<sup>212</sup> See, e.g., *United States v. Chatham City Corp.*, 72 F.R.D. 640, 643 (S.D. Ga. 1976) (FBI agents' interview notes and statements taken by government attorneys are work product).

<sup>213</sup> See, e.g., *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019, 1027 (S.D.N.Y. 1980) (investigative report prepared by or at request of nonattorney on litigation and recall staff of Food and Drug Administration was work product).

In *United States v. Nobles*, the court explained this rule, stating:

[The work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

422 U.S. at 238-39 (footnote omitted).

Rule 26(b)(3) accords special protection to investigative reports when they contain opinion work product. FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970) ("[A] much stronger showing [of good cause] is needed to obtain evaluative materials in an investigator's reports.").

<sup>214</sup> *In re Grand Jury Proceedings* (McCoy), 601 F.2d 162, 171 (5th Cir. 1979). Other courts have extended work product protection to investigations made in anticipation of grand jury proceedings. See, e.g., *In re Grand Jury Investigation* (Sun), 599 F.2d 1224, 1229 (3d Cir. 1979); *In re Grand Jury Proceedings* (Duffy), 473 F.2d 840, 848 (8th Cir. 1973).

<sup>215</sup> See, e.g., *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976) (indicating government investigative reports were work product if prepared in anticipation of litigation), *cert. denied*, 430 U.S. 945 (1977); *United States v. Chatham City Corp.*, 72 F.R.D. 640, 643 (S.D. Ga. 1976) (FBI agents' investigative reports prepared in anticipation of litigation were work product).

<sup>216</sup> See *Arney v. Geo. A. Hormel & Co.*, 53 F.R.D. 179, 181 (D. Minn. 1971) (legal memoranda from one law firm member to another and from one company executive to another were work product).

<sup>217</sup> Compare *SEC v. World-Wide Coin Invs., Ltd.*, 92 F.R.D. 65 (N.D. Ga. 1981) (SEC

tion concerning agency memoranda often arises under the Freedom of Information Act (FOIA),<sup>218</sup> and not under the federal discovery rules. The Supreme Court decided in *NLRB v. Sears, Roebuck & Co.*,<sup>219</sup> however, that exemption 5 of the FOIA<sup>220</sup> incorporates the protection of work product immunity.<sup>221</sup>

Rule 26(b)(3)'s definition of ordinary work product is not limited to witness statements, investigative reports, and interview and intraoffice memoranda. The rule also protects stenographic, mechanical, or electronic recordings prepared in anticipation of litigation.<sup>222</sup> Prior to the

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staff memorandum recommending enforcement action is work product under rule 26(b)(3)) and *Thill Sec. Corp. v. New York Stock Exch.*, 57 F.R.D. 133, 138 (E.D. Wis. 1972) (intra- or inter-agency memoranda of Antitrust Division of Department of Justice and SEC evidencing the agencies' position concerning the legality of defendant's antirebate rule were work product) with *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865-66 (D.C. Cir. 1980) (Department of Energy memoranda issued by regional counsel to field auditors were not work product because not prepared in anticipation of litigation) and *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 775-76 (D.C. Cir. 1978) (Department of Justice manuals not prepared in anticipation of litigation were not work product).

<sup>218</sup> 5 U.S.C. § 552 (1982).

<sup>219</sup> 421 U.S. 132, 154 (1975).

<sup>220</sup> 5 U.S.C. § 552(b)(5) (1982) provides:

(b) This section does not apply to matters that are —

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(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

<sup>221</sup> The Court held that memoranda explaining the NLRB general counsel's decision to file an unfair labor practice complaint were work product protected by exemption 5. 421 U.S. at 159-60. The Court stated:

The [Advice and Appeals] Memoranda will inexorably contain the General Counsel's theory of the case and may communicate to the Regional Director some litigation strategy or settlement advice. Since the Memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within Exemption 5's protection of an attorney's work product.

*Id.*

However, the standard for discovery of work product under exemption 5 is different from that under rule 26(b)(3). Under rule 26(b)(3), a court examines the discovering party's individual need for the requested information to determine whether to allow discovery. Under the FOIA, the substantial need test is not applied. *See Kent Corp. v. NLRB*, 530 F.2d 612, 624 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). Instead of asserting his own substantial needs, the discovering party argues that the general public has a right to information under the Act. *Id.* This anomaly exists because the words of the FOIA require disclosure to "any person." *See* 1 K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 3A.21, at 92 (1976) ("[T]he courts in giving meaning to the fifth exemption have been guided less by discovery law than by the policies behind the fifth exemption."); *see also Kent Corp. v. NLRB*, 530 F.2d 612, 621 n.20, 624 (5th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976). For a discussion of the scope of Exemption 5's protection of work product, *see infra* notes 606-25 and accompanying text.

<sup>222</sup> *See, e.g., In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982) (holding that transcript of cassette tape dictated by attorney was opinion work product); *In re Grand Jury Subpoena Dated Nov. 9, 1979*, 484 F. Supp. 1099, 1102 n.2 (S.D.N.Y. 1980) (classifying tape recordings made by attorney as work product). *But see Fort Howard Paper Co. v. Affiliated F.M. Ins. Co.*, 64 F.R.D. 694, 696 (E.D. Wis. 1974) (tape recording and transcript of interview that plaintiff's employee gave to its insurance agent held not to be work product). The *Fort Howard Paper Co.* decision is troublesome because the recordings were clearly made in anticipation of

adoption of rule 26(b)(3), courts were divided over the work product classification of photographs.<sup>223</sup> Some courts reasoned that photographs were not work product because their preparation did not require the skill of an attorney.<sup>224</sup> Other courts held that although photographs were work product, the difficulty of duplicating them overcame the qualified immunity.<sup>225</sup> Under rule 26(b)(3), photographs, diagrams, and sketches are work product,<sup>226</sup> as are surveillance films.<sup>227</sup>

Courts have extended work product protection to computer tapes and printouts. For example, one court held that computer printouts

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litigation under the direction of an attorney. *Id.* at 695-96. Moreover, the court failed to articulate any reasons why it vitiated rule 26(b)(3)'s qualified immunity. The court did not even attempt to ground its decision on the rule 26(b)(3) formula which would permit discovery of electronic recordings containing little opinion work product if the substantial need, undue hardship, and no substantial equivalent tests were met. *See In re Grand Jury Subpoena* Dated Nov. 9, 1979, 484 F. Supp. 1099, 1104-05 (S.D.N.Y. 1980). For a general discussion of the rule 26(b)(3) requirements, see *infra* notes 241-57 and accompanying text.

<sup>223</sup> Compare *Hughes v. Groves*, 47 F.R.D. 52, 56 (W.D. Mo. 1969) (photographs are not properly part of work product of lawyer) with *Atlantic Greyhound Corp. v. Lauritzen*, 182 F.2d 540, 542 (6th Cir. 1950) (implying that photographs were work product, but not protected under *Hickman*) and *Cogdill v. TVA*, 7 F.R.D. 411, 415 (E.D. Tenn. 1947) (holding that interrogatory asking for "attachment" of photographs was improper under *Hickman*, but later allowing production of photographs on showing of "good cause" under old rule 34).

<sup>224</sup> See, e.g., *Shields v. Sobelman*, 64 F. Supp. 619, 620 (E.D. Pa. 1946) (holding that obviously relevant photographs of machinery were not protected under *Hickman* because "there is very little of legal talent that goes into the supervision and direction of the taking of these photographs"); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 209 (listing cases holding that photographs are not work product).

<sup>225</sup> See *Kagan v. Langer Transp. Co.*, 43 F.R.D. 404 (S.D.N.Y. 1967) (holding that photographs of accident should be produced since duplication unlikely). The great bulk of cases prior to 1970 held that photographs were discoverable. See, e.g., *Atlantic Greyhound Corp. v. Lauritzen*, 182 F.2d 540, 542 (6th Cir. 1950); 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 209.

<sup>226</sup> See *Galambus v. Consolidated Freightways Corp.*, 64 F.R.D. 468, 473 (N.D. Ind. 1974) (discussing only sketches and diagrams but implying that photographs are also work product); *Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974) (treating, without deciding, photographs and surveillance films as work product); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 208-09 (indicating that photographs are work product). The lack of recent work product cases involving photographs indicates that many litigants produce photographs as a matter of course, instead of arguing for protection under rule 26(b)(3). See *Smedley v. Travelers Ins. Co.*, 53 F.R.D. 591, 592 (D.N.H. 1971) (no claim of immunity for photographs or motion pictures of accident and its participants).

<sup>227</sup> Compare *Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974) (implying that surveillance films are work product, but nevertheless discoverable under 26(b)(3)) with *Blyther v. Northern Lines, Inc.*, 17 Fed. R. Serv. 2d (Callaghan) 340, 341 (E.D. Pa. 1973) (surveillance films are not work product). Cf. *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973). The *Snead* court found that although surveillance films could be work product, they were discoverable if the discovering party showed substantial need. In a footnote, the court noted:

The steps a client takes to protect its interests, such as investigating an accident or obtaining surveillance films, are not within the attorney-client privilege. On the other hand, a discussion between client and counsel about the films would be. The mental impressions, opinions, and evaluations of the films by an attorney would be exempt from discovery by Rule 26(b)(3).

*Id.* at 150 n.2.

containing employee pay data prepared by an agent of the defendant at the request of the defendant's counsel were work product.<sup>228</sup> Questionnaires and surveys prepared in anticipation of litigation are also protected under rule 26(b)(3).<sup>229</sup> In sum, courts have applied rule 26(b)(3) to protect a wide variety of documents and tangible things prepared in anticipation of litigation.

## 2. Ordinary Work Product Protection Standard

a. *Statement of the Standard and Underlying Policies.* Once a court classifies a document or tangible thing as ordinary work product, a party seeking discovery under rule 26(b)(3) must show that he has "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>230</sup> This test reflects the rule's implicit balancing of the needs of the adversary system and those of the individual party. Rule 26(b)(3) sets the adversary system's interests in protecting work product<sup>231</sup> just below the interests of an individual who can demonstrate that he satisfies the requirements of undue hardship, lack of a substantial equivalent, and substantial need. If a petitioner for discovery cannot make this three-part showing, his particular needs must yield to the aggregation of policies favoring work product protection. Thus, the needs of a particular party in a particular case are limited by the

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<sup>228</sup> *Equal Employment Opportunity Comm'n v. Avco New Idea Div.*, 26 Fed. R. Serv. 2d (Callaghan) 736, 741 (N.D. Ohio 1978). Because the plaintiff had already discovered the underlying data on the printouts (although in a less usable form) the court found no showing of substantial need to overcome the immunity. *Id.* But see *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (plaintiff required to create computer-readable tape containing data previously supplied to defendants). The *Avco* case also illustrates that data or facts making up a computer data base are not protected by rule 26(b)(3).

<sup>229</sup> See, e.g., *Connelly v. Dun & Bradstreet, Inc.*, 33 Fed. R. Serv. 2d (Callaghan) 1729, 1732 (D. Mass. 1982) (questionnaires sent to former customers of bankrupt corporation by court-appointed attorney were work product); *Karan v. Nabisco, Inc.*, 28 Fed. R. Serv. 2d (Callaghan) 794, 796 (W.D. Pa. 1979) (attitudinal survey prepared in developing defense to employment discrimination claim was protected work product).

<sup>230</sup> FED. R. CIV. P. 26(b)(3). Petitioners for discovery of ordinary work product only need to meet the standard set out in this first sentence of the rule. To discover opinion work product materials, parties must satisfy at least this standard. The second sentence of Federal Rule of Civil Procedure 26(b)(3), dealing with opinion work product, reads: "In ordering discovery of such materials *when the required showing has been made* . . ." (emphasis added). The further showing required for discovery of opinion materials depends on whether the court reads the rule and *Hickman* to require an absolute prohibition on opinion discovery, see *infra* notes 365-91 and accompanying text, a strict protection standard, see *infra* notes 404-23 and accompanying text, or a balancing approach, see *infra* notes 392-403 and accompanying text.

<sup>231</sup> See *Developments, supra* note 2, at 1028 ("[T]he rationale for the work-product doctrine rests . . . on the desire to promote the effectiveness of the adversary system by safeguarding the vigorous representation of a client's cause from the possibly debilitating effects of susceptibility to discovery."); *supra* note 163 and accompanying text.



potential effect of similar discovery in all other cases and the rule's implicit balance marks the point where the individual's needs must yield to the interests of the system as a whole.

In a broader sense, the three-part standard represents an accommodation of the policy concerns of *Hickman* with those favoring liberal discovery. Both liberal discovery and work product immunity are designed to promote the effectiveness of the adversary system by encouraging fact and issue development.<sup>232</sup> But because liberal discovery serves these purposes in each individual case, while the work product doctrine acts upon the judicial system as a whole to encourage thorough preparation and diligence, the two doctrines conflict in practice. The compromise that rule 26(b)(3) effects between liberal discovery and work product immunity protects attorney privacy and promotes fact maximization and attorney diligence.

First, the rule 26(b)(3) standard protects the attorney's privacy in preparing for trial<sup>233</sup> while ensuring that information essential to a just decision is available to both parties. The work product doctrine, however, does not protect attorney privacy for its own sake.<sup>234</sup> Rather it frees counsel to prepare more thoroughly for trial. Thorough preparation advances the goals of the adversary system by preventing errors unrelated to the merits of the case and promoting a robust clash of adversary presentations.

The rule 26(b)(3) formula also serves the policies of fact maximization and issue development.<sup>235</sup> Facts and legal theories in isolation are freely discoverable. When they are intermingled with other matter in a

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<sup>232</sup> See *supra* notes 45, 174, 188-89 and accompanying text.

<sup>233</sup> The *Hickman* Court expressed concern that the adversary system would be harmed if "unnecessary intrusion by opposing parties and their counsel" were permitted. 329 U.S. at 510-11. The Court cited an attorney's need to work in privacy, to "sift . . . the relevant from the irrelevant facts, prepare his legal theories and plan his strategy." *Id.* at 511. The Court then recited a litany of foreseeable harmful effects:

[M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop. . . . The effect on the legal profession would be demoralizing and the interests of the clients and the cause of justice would be poorly served.

*Id.*; see *supra* notes 102-12 and accompanying text.

<sup>234</sup> Attorney privacy is not a special privilege of lawyers; it is a special need of the adversary system. When lawyer privacy does not further thorough preparation for trial, there is no justification for protecting it. The work product doctrine, the source of this special protection, is particularly prone to abuse by self-interested individuals, and thus to laymen's accusations that lawyers protect their own. None of the actors in a courtroom has an undivided interest in piercing attorney privacy. Even judges, the overwhelming majority of whom are members of the bar and a considerable number of whom return to private practice, are not disinterested. Thus, courts frequently cite attorney privacy as a reason for denying work product discovery without further explanation. See, e.g., *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 33 (D. Md. 1974); *Burke v. United States*, 32 F.R.D. 213, 214 (E.D.N.Y. 1963).

<sup>235</sup> See *supra* notes 45, 188-89 and accompanying text.

work product document, however, the work product protection of rule 26(b)(3) curtails liberal discovery. Nevertheless, discovery will be permitted, and the policies of liberal discovery vindicated, if the three-part standard is met. Ordinary work product documents or information that a party needs to pursue his case, and cannot obtain elsewhere, are discoverable.

The three-part standard also promotes issue development and fact maximization by ensuring attorney diligence.<sup>236</sup> The adversary method posits that two investigations of the facts will produce a more complete picture of the truth; the work product doctrine encourages dual investigation by shielding documents that the other party could reproduce by diligent effort. Where, however, two investigations are impracticable because the substantial equivalent of the material sought is not available, discovery is permitted.

Although the policies of attorney privacy, fact maximization, and diligence of counsel are paramount, courts often refer to other ancillary policies to further justify protection of work product. The Supreme Court in *Hickman* originally set out the two most frequently cited ancillary policies: the prohibition against advocates serving as witnesses,<sup>237</sup> and the promotion of completeness and accuracy achieved by encouraging attorneys to write down information instead of relying upon memory.<sup>238</sup> In practice, these policies are interrelated because attorneys will not write down recollections which, if discovered, they will be called to verify at trial. More than professional dignity is involved; the advocate as witness may violate the standards of professional responsibility.<sup>239</sup> The rule 26(b)(3) standard for work product protection should minimize or eliminate the secondary effects of being called to the witness stand.<sup>240</sup>

b. *Definition of the Three-Part Showing Requirement.* Having set out

<sup>236</sup> See *supra* note 169 and accompanying text; *infra* note 238 and accompanying text.

<sup>237</sup> 329 U.S. at 513; see also *supra* notes 172-73 and accompanying text.

<sup>238</sup> 329 U.S. at 512-13; see also *supra* notes 169-70 and accompanying text.

<sup>239</sup> The Code of Professional Responsibility requires a lawyer to withdraw from a case if he will be called as a witness on behalf of his client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (1979). As one court noted: "[T]he object of this precept is to avoid putting a lawyer in the obviously embarrassing predicament of testifying and then having to argue the credibility and effect of his own testimony." *Galarowicz v. Ward*, 119 Utah 611, 620, 230 P.2d 576, 580 (1951) (discussing Canon 19 of Canons of Professional Ethics, from which DR 5-102 is derived).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (Final Draft 1983) also addresses the question, stating: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . ."

<sup>240</sup> See *In re Grand Jury Investigation* (Sun), 599 F.2d 1224 (3d Cir. 1979) (articulating problems of attorney as witness); see also Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 586-92 (1980) (discussing fear of "dilution of counsel's effectiveness as service in the role of witness becomes more frequent"). But see *supra* notes 172-73 and accompanying text (testimonial problems too narrow to justify solution as far-reaching as work product doctrine).

the rule 26(b)(3) standard for discovery of ordinary work product and the policies behind that standard, this subsection will define the undue hardship, substantial need, and no substantial equivalent requirements. The next subsection will explore how courts have used, and should use, these requirements to resolve discovery questions.

To fulfill the undue hardship requirement, a party must: try<sup>241</sup> but be unable to obtain the information contained in requested documents without going to great lengths; lack knowledge of where else to obtain the information; or show that the information is completely unavailable elsewhere. For example, after one party has taken depositions or statements from scattered witnesses, the other party may not be able to locate those witnesses to obtain the same information.<sup>242</sup> If the adverse party does not know the names or addresses of witnesses or other persons with information about the claim, rule 33 requires disclosure by the knowledgeable party to enable the adverse party to conduct his own interviews or depositions.<sup>243</sup> In some cases, the documents requested may summarize information that would be extremely difficult to reproduce: surveys of a company's employees, analyses of a company's tax liability, or reviews of internal business operations.<sup>244</sup> Undue hardship may arise in personal injury litigation when an accident victim is unable to retain counsel until long after the accident, and thus loses the chance to take contemporaneous statements from witnesses whose memories may fade over time.<sup>245</sup> Some courts and commentators, however, deal with this last example in terms of unfair advantage to the defendant, rather than undue hardship to the plaintiff.<sup>246</sup>

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<sup>241</sup> See *Hickman*, 329 U.S. at 512-13; *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299 (8th Cir. 1974) (court held undue hardship not shown where defendant's counsel made no attempt to obtain statements from witnesses directly); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977) (where a defendant did not request any depositions or interrogatories, no hardship shown); *United States v. Chatham City Corp.*, 72 F.R.D. 640 (S.D. Ga. 1976) (defendant must interview potential witnesses before any claim of hardship is permitted); *Almaguer v. Chicago, R.I. & P.R.R.*, 55 F.R.D. 147, 150 (D. Neb. 1972) (court required showing of "some diligence on the part of the plaintiff" and denied plaintiff's discovery motion because petitioner gave no explanation for his failure to take depositions). *But see* *Southern Ry. v. Lanham*, 403 F.2d 119, 130 (5th Cir. 1968) (court rejected "rigid rule that the moving party must always show that he has been unable to obtain statements of his own.")

<sup>242</sup> See cases cited in 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[3], at 26-427 n.12.

<sup>243</sup> See FED. R. CIV. P. 33; *see also* *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299 (8th Cir. 1974); *Edgar v. Finley*, 312 F.2d 533 (8th Cir. 1963); *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960); *United States v. Chatham City Corp.*, 72 F.R.D. 640 (S.D. Ga. 1976); *Developments*, *supra* note 2, at 1034.

<sup>244</sup> *Cf.* *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *In re Grand Jury Investigation (Sun)*, 599 F.2d 1224 (3d Cir. 1979); *Crocker v. United States*, 51 F.R.D. 155 (N.D. Miss. 1970).

<sup>245</sup> See *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 50 (4th Cir. 1963) (plaintiff unable to engage counsel for "many weeks" after auto accident in issue due to injuries); *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962); *Developments*, *supra* note 2, at 1089.

<sup>246</sup> See *infra* notes 323-24 and accompanying text.

The substantial need requirement is the least uniformly applied by the courts.<sup>247</sup> The rule simply states that the party must "need . . . the materials in the preparation of his case."<sup>248</sup> The test requires a showing that the discovering party needs the materials to prove his case, not that he cannot afford to obtain them on his own.<sup>249</sup> The most common example of substantial need is a party seeking information to impeach a witness and thereby discredit a portion of his opponent's proof.<sup>250</sup> However, by requiring counsel to show a strong possibility that the materials requested will in fact impeach the witness, courts have prevented impeachment from becoming a routine loophole in work product protection.<sup>251</sup> On occasion, counsel may be forced to reveal trial strategy in order to show substantial need. Some courts avoid this problem by routinely finding that counsel has satisfied the need requirement without discussing how the need allegation was proved.<sup>252</sup>

The substantial equivalent test is both an extension and an elaboration of the substantial need test. A party is not entitled to discover a

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<sup>247</sup> Most cases skim over the substantial need requirement by simply stating that it has been met. Summary denials of work product protection usually assert that no need or hardship has been shown. *See, e.g.,* Stout v. Norfolk & W. Ry., 90 F.R.D. 160 (S.D. Ohio 1981) (substantial need shown because statements sought held essential to case); APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10 (D. Md. 1980) (court merely states substantial need exists); Augenti v. Cappellini, 84 F.R.D. 73 (M.D. Pa. 1979) (discoverer alleges substantial need and court does not discuss); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443 (W.D. Mo. 1976) (need found where information could not be secured otherwise). Disregard of this requirement is probably due to one of two factors: either the material sought is obviously essential to the case, for example, where the sole witness died before both parties could depose him, or the court is unwilling to force the moving party to reveal his trial strategy, which proof of need might require. Thus, the substantial need requirement, as implemented, is more like a mere relevance requirement.

<sup>248</sup> FED. R. CIV. P. 26(b)(3).

<sup>249</sup> *See infra* notes 301-12 and accompanying text.

<sup>250</sup> *See* J.H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973); Hauger v. Chicago, R.I. & P.R.R., 216 F.2d 501 (7th Cir. 1954); Seven-Up Co. v. Get-Up Corp., 30 F.R.D. 550 (N.D. Ohio 1962); United States v. Great N. Ry., 18 F.R.D. 357 (N.D. Cal. 1955); Hudalla v. Chicago, M., St. P. & P.R.R., 10 F.R.D. 363 (D. Minn. 1950); Nedimyer v. Pennsylvania R.R., 6 F.R.D. 21 (E.D. Pa. 1946); Cooper, *supra* note 129, at 1310-13; LaFrance, *supra* note 33, at 366; *Developments, supra* note 2, at 1038; Note, *Discovery of Attorney's Work Product*, 12 GONZ. L. REV. 284, 289 (1977) [hereinafter cited as Note, *Discovery of Attorney's*]; Note, *Attorney's Work-Product Privilege in the Federal Courts*, 42 ST. JOHN'S L. REV. 560, 572 (1968) [hereinafter cited as Note, *Attorney's Work Product Privilege*]; Comment, *Basic Survey of Work Product in Federal and State Jurisdictions in Civil and Criminal Proceedings*, 35 TENN. L. REV. 474, 485-86 (1968).

<sup>251</sup> *See* Young v. UPS, 88 F.R.D. 269, 271 (D.S.D. 1980) (mem.) (strong possibility of variance between witnesses' statements to insurance adjuster and their deposition testimony demonstrated a substantial need); Hamilton v. Canal Barge Co., 395 F. Supp. 975 (E.D. La. 1974) (alleged minor discrepancies constitute inadequate showing of need); Helverson v. J.J. Newberry Co., 16 F.R.D. 330 (W.D. Mo. 1954) (discovery denied because statements taken from witnesses different in some respects, but not enough to impeach); *see also* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (per curiam) (material discrepancies found between witness's deposition and his debriefing after grand jury testimony), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971).

<sup>252</sup> *See, e.g.,* cases cited, *supra* note 247.

document merely because he cannot get the same information from the same person; if the substantial equivalent is available from an alternative source, discovery is denied.<sup>253</sup> For example, if the plaintiff requires proof that the defendant was driving the car that struck him, the police report of the accident will usually be considered the substantial equivalent of reliable eyewitness testimony.<sup>254</sup> In this sense, the substantial equivalent requirement extends the range of work product protection. However, courts extend work product protection less often in situations where one party holds forged documents,<sup>255</sup> photographs,<sup>256</sup> analyses of broken machinery,<sup>257</sup> or other materials that may be impossible to duplicate substantially.

### 3. *Application of Rule 26(b)(3) to Ordinary Work Product: Specific Characterizations*

A multitude of cases since the 1970 amendments has fleshed out the three requirements for discovery of work product under rule 26(b)(3). Building upon the Advisory Committee notes,<sup>258</sup> courts have identified several recurring situations that, as a group, cover most discovery situations. These characterizations include contemporaneous statements,<sup>259</sup> unavailability or death of witnesses,<sup>260</sup> proven hostility or reluctance of witnesses,<sup>261</sup> a strong possibility of material, impeaching discrepancies between a witness's statements,<sup>262</sup> inability of the plaintiff to obtain counsel until after the incident giving rise to the action,<sup>263</sup> lapse of time since the original statement,<sup>264</sup> and, in unique cases, the expense of obtaining discovery.<sup>265</sup> Courts often view proof that one's case fits within one of these characterizations as satisfying the rule 26(b)(3) test for per-

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<sup>253</sup> Cf. *Rackers v. Siegfried*, 54 F.R.D. 24 (W.D. Mo. 1971) (ordering production of insurance adjuster's report even though police report existed because police report's accuracy was in dispute). Courts apply this limitation carefully to ensure that the alternative source is truly a substantial equivalent.

<sup>254</sup> *Id.*

<sup>255</sup> No substantial equivalent exists for an allegedly forged document. Because that particular piece of paper is at issue, it cannot be duplicated for testing by experts.

<sup>256</sup> See *supra* notes 223-26; see also cases cited in 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[3], at 26-421 to -426.

<sup>257</sup> See Comment, *supra* note 250, at 486 (reports of experts hired to disassemble defective machines after accidents "to determine the exact nature" of defects "have been consistently discoverable" because the machine can never be returned to the "original condition that it possessed immediately after the accident"); see also *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954); *Colden v. R.J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952).

<sup>258</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 497 (1970).

<sup>259</sup> See *infra* notes 268-80 and accompanying text.

<sup>260</sup> See *infra* notes 281-86 and accompanying text.

<sup>261</sup> See *infra* notes 287-92 and accompanying text.

<sup>262</sup> See *infra* notes 293-96 and accompanying text.

<sup>263</sup> See *infra* notes 297-98 and accompanying text.

<sup>264</sup> See *infra* notes 299-300 and accompanying text.

<sup>265</sup> See *infra* notes 301-12 and accompanying text.

mitting discovery of protected materials.<sup>266</sup>

Because of the weight given to these characterizations, however, they are prone to abuse. Courts have used them as a shortcut around the three-factor analysis, often following the form of the three-part standard while engaging in little, or no, analysis of the factors. Decisions typically focus on one characterization, implicitly assuming that the other requirements are satisfied.<sup>267</sup> Correct treatment of work product discovery questions requires an understanding of the policy justifications underlying each characterization.

a. *Contemporaneity.* The most abused characterization is discovery of statements taken contemporaneously with the event giving rise to the action. Originally, courts held that statements taken shortly after the event acted as "unique catalysts in the search for truth"<sup>268</sup> and thus no substantial equivalent existed.<sup>269</sup> This finding resulted from psychological studies documenting that a witness's recall diminishes dramatically one to two days after an event, and then remains stable for an extended period of time.<sup>270</sup> Thus, courts felt that a party obtaining statements within the high recall period would possess a more complete and accurate record of the event than the other party.<sup>271</sup>

Not all courts have treated the contemporaneity characterization

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<sup>266</sup> See, e.g., *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958) (refusal of witness to give information held to constitute good cause); *Condon v. Petacque*, 90 F.R.D. 53 (N.D. Ill. 1981) (conflicting answers to inquiries during discovery held demonstration of substantial need); *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y. 1955) (statements taken by defendant's employees constituting immediate impressions of accident held unique and discoverable).

<sup>267</sup> See *supra* note 247 and accompanying text.

<sup>268</sup> *Johnson v. Ford*, 35 F.R.D. 347, 350 (D. Colo. 1964).

<sup>269</sup> See *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89 (E.D. Mo. 1980) (no discovery of statement taken on day of accident when discoverer had police report of accident from more contemporaneous time); *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 978 (E.D. La. 1974) ("These statements must be produced because the plaintiffs are completely unable to obtain their substantial equivalent, not simply unable to obtain them without undue hardship."). But see *Stout v. Norfolk & W. Ry.*, 90 F.R.D. 160, 162 (S.D. Ohio 1981) (interpreting contemporaneity as proof of "undue hardship" factor).

<sup>270</sup> See J. GRAY, *PSYCHOLOGY IN USE* 242 (2d ed. 1951); Dallenbach, *The Relation of Memory Error to Time Interval*, 20 *PSYCHOLOGICAL REV.* 323 (1913); Gardner, *The Perception and Memory of Witnesses*, 18 *CORNELL L.Q.* 391, 393-96 (1933); see also C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 82 n.35 (4th ed. 1983) (citing other studies).

<sup>271</sup> In most cases, one party will have a contemporaneous statement. This is especially true in cases involving railroads. See, e.g., *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962); *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962). Railroads often obtain contemporaneous statements because their employees must follow strict recordkeeping requirements, either imposed by the government, see *Stout v. Norfolk & W. Ry.*, 90 F.R.D. 160 (S.D. Ohio 1981) (noting that the ICC usually requires railroads to prepare accident reports), or by the railroads' management for maximum protection against litigation resulting from accidents. Because litigants have viewed railroads as notorious "deep pockets," management takes extra steps to protect the company from continuous litigation.

uniformly. Some judges distorted the concept of contemporaneity by ignoring its underlying rationale, and applied it blindly as an exception to work product protection.<sup>272</sup> Other courts, perhaps to prevent the contemporaneity consideration from becoming an automatic ground for discovery, and perhaps out of distrust of the psychological evidence, added a requirement that the witness be unavailable to the discovering party for a substantial time after the incident.<sup>273</sup> Finally, other judges compromised by drawing the line for contemporaneity at one to two weeks,<sup>274</sup> evidently giving the discovering party the benefit of the doubt. This compromise tolerates error in the psychological data while reasonably limiting discovery.

Contemporaneity depends largely on whether the substantial equivalent is available. To be justified, however, it must also serve the policies of fact maximization, privacy of counsel, and attorney diligence.<sup>275</sup> Requiring counsel to obtain the same information by other discovery whenever possible avoids unnecessary intrusions on opposing counsel's privacy. If, however, the information is not available because a witness's memory has faded, fact maximization requires disclosure. The additional requirement that the witness be subsequently unavailable not only supports these first two policies, but also fosters diligence of counsel in pursuing potential witnesses. In cases where a witness is unavailable,<sup>276</sup> the documents will be discoverable but their preparation will not be deterred because attorneys and parties need these documents to bind witnesses to their versions of the event<sup>277</sup> and to impeach adverse witnesses.<sup>278</sup> Moreover, a witness's statements are likely to contain facts not otherwise discoverable through interrogatories or depositions.<sup>279</sup>

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<sup>272</sup> See *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963) (rejecting *Guilford's* requirements for contemporaneity); *Southern Ry. v. Campbell*, 309 F.2d 569, 572 (5th Cir. 1962) (citing contemporaneity and other considerations, then flatly stating that the "principles [of *Hickman*] were not violated").

<sup>273</sup> See, e.g., *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962); *Stout v. Norfolk & W. Ry.*, 90 F.R.D. 160 (S.D. Ohio 1981). The Advisory Committee included this restriction in its list of considerations: "The witness may have given a fresh and contemporaneous account . . . while he is available to the party seeking discovery only a substantial time thereafter." FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970) (citations omitted).

<sup>274</sup> See *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 978 (E.D. La. 1974) ("Were a statement given a week, or two weeks, after the accident at issue, the court might well require counsel to demonstrate . . . that the witness was not available for deposition without undue hardship."). But see *Ghason v. Research-Cottrell, Inc.*, 29 Fed. R. Serv. 2d (Callaghan) 1459 (S.D. Ala. 1980) (one month still contemporaneous).

<sup>275</sup> See *supra* notes 174, 188-89, 191 and accompanying text.

<sup>276</sup> See *Cooper, supra* note 129, at 1277-78, 1323; see also *supra* notes 169-70 and accompanying text (suggesting that deterrence of written preparation is only secondary policy for work product protection).

<sup>277</sup> *Cooper, supra* note 129, at 1277 (quoting F. JAMES, CIVIL PROCEDURE 206 (1965)).

<sup>278</sup> *Id.*; see generally *Cooper, supra* note 129, at 1324-28.

<sup>279</sup> See, e.g., *Southern Ry. v. Lanham*, 403 F.2d 119, 128 (5th Cir. 1968) ("statements taken from the witnesses shortly after the accident constitute 'unique catalysts in the search

Other types of ordinary work product susceptible to characterization as "contemporaneous," such as photographs, surveillance films, and electronic recordings, are also discoverable because no substantial equivalent of the materials exists and the discovering party can usually show a substantial need for them.<sup>280</sup>

b. *Dead or Unavailable Witnesses.* A dead or unavailable witness presents the extreme case of undue hardship in obtaining needed information. If the witness's testimony provides the only proof of a particular proposition, counsel cannot obtain the substantial equivalent from an alternative source.<sup>281</sup> In many cases, counsel will not contest discovery of such statements because of this obvious hardship.<sup>282</sup> The courts, however, have not developed a concrete rule for determining when a witness is deemed unavailable; the few courts that have dealt with the problem have rendered conflicting opinions.<sup>283</sup>

The test of unavailability should be identical to that of Federal

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for truth,' . . . in that they provide an immediate impression of the facts that cannot be recreated or duplicated by a deposition that relies upon memory") (citations and footnotes omitted). Because written witness statements substantially lack the "core" work product most important to proper functioning of the adversary system, and because their production furthers the purposes of discovery, work product provides only a qualified protection for written witness statements.

<sup>280</sup> See *In re Grand Jury Subpoena* Dated Nov. 9, 1979, 484 F. Supp. 1099, 1104-05 (S.D.N.Y. 1980) (attorney's tape recorded conversations held discoverable because of absence of alternative means for discovering the information and government's showing of substantial need); *Galambus v. Consolidated Freightways Corp.*, 64 F.R.D. 468, 473 (N.D. Ind. 1974) ("Photographs, diagrams and the like made at or about the time of the occurrence giving rights to the suit, should be held discoverable under Rule 26(b)(3) . . ."); *Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974) (surveillance films and photographs discoverable under rule 26(b)(3) substantial need and substantial equivalent tests); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973) (same); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 208-09 (predicting that photographs will continue to be discoverable under rule 26(b)(3)).

<sup>281</sup> *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975 (E.D. La. 1974) (statement of deceased witness discoverable); *Wilson v. David*, 21 F.R.D. 217 (W.D. Mich. 1957) (statement of witness out of state discoverable unless defendant revealed witness's address in jurisdiction). The Court in *Upjohn* noted that this availability consideration does not apply to opinion work product—"oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." 449 U.S. at 399 (quoting *Hickman*, 329 U.S. at 512).

<sup>282</sup> See, e.g., *In re Grand Jury Investigation* (Sun), 599 F.2d 1224, 1231 (3d Cir. 1979) (counsel virtually conceded good cause to discover notes, edited of mental impressions, of interviews with deceased employees).

<sup>283</sup> Compare *Wilson v. David*, 21 F.R.D. 217 (W.D. Mich. 1957) (discovery of out-of-state witness's statement ordered unless defendant revealed witness's in-state address) with *Lester v. Isbrandtsen Co.*, 10 F.R.D. 338 (S.D. Tex. 1950) (fact that witness is in another state insufficient to order production). The commentators prove similarly unhelpful. Professors Wright and Miller find the rule of *Wilson v. David* "unsound as a rule for federal courts since state lines do not restrict the taking of depositions," but fail to offer a solution. See 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2025, at 217.



Rule of Evidence 804(a):<sup>284</sup> a witness is considered unavailable if the court cannot subpoena him to submit to a deposition.<sup>285</sup> Unless the witness can be found,<sup>286</sup> and either agrees to the deposition or can be subpoenaed, a party can show undue hardship amounting to impossibility. This requirement satisfies the policies of diligence and privacy. If counsel cannot obtain an unavailable witness's deposition, lack of diligence is not the cause. If the deponents needed are available, however, courts will deny discovery of the deposition, preserving opposing counsel's privacy.

c. *Hostile or Reluctant Witnesses; Employees of the Opposing Party.* If a hostile or reluctant witness will not provide complete answers, his deposition may not constitute the substantial equivalent of a voluntary statement.<sup>287</sup> Although the court cannot force the deponent to answer more fully, it can use its contempt power as an inducement.<sup>288</sup> However, to demonstrate undue hardship in obtaining the substantial equivalent, the discoverer must show the witness's hostility or reluctance in the form of a refusal to be deposed or verbal expressions of hostility.<sup>289</sup> Counsel frequently, but unsuccessfully, attempt to satisfy this requirement by claiming that employees of the adverse party should be assumed hostile because of their allegiance to their employer.<sup>290</sup>

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<sup>284</sup> Federal Rule of Evidence 804(a) provides:

"Unavailability as a witness" includes situations in which the declarant—

...

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

<sup>285</sup> See FED. R. CIV. P. 30(b)(2), 45(d); *Wilson v. David*, 21 F.R.D. 217 (W.D. Mich. 1957); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2025, at 216-24 (comparing unavailability standards employed).

<sup>286</sup> If the party cannot in good faith locate the witness, courts have uniformly found the witness unavailable, satisfying the undue hardship requirement. See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[3], at 26-427 n.12.

<sup>287</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970); see, e.g., *In re Grand Jury Subpoena* Dated Nov. 9, 1979, 484 F. Supp. 1099, 1104 (S.D.N.Y. 1980); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264, 266 (D. Colo. 1963); *Brookshire v. Pennsylvania R.R.*, 14 F.R.D. 154, 159 (N.D. Ohio 1953). The Federal Rules of Evidence note this problem but deal with it by terming the reluctant or hostile witness an unavailable witness. See FED. R. EVID. 804(a) ("Unavailability as a witness" includes situations in which the declarant—. . . (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so . . .").

<sup>288</sup> An extremely hostile witness may also leave or stay out of the jurisdiction of the court that ordered the deposition, thereby avoiding both subpoena and contempt sanctions.

<sup>289</sup> See *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

<sup>290</sup> See *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962); *Young v. UPS*, 88 F.R.D. 269 (D.S.D. 1980); *Hanson v. Gartland S.S. Co.*, 34 F.R.D. 493 (N.D. Ohio 1964); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D. Colo. 1963); see also *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963). All these cases found evidence of employment relevant but inconclusive. In *Young*, the court explained that when a witness had been de-

The requirement of proof of hostility or reluctance prevents abuse of this characterization<sup>291</sup> and furthers the policies expressed in *Hickman* by encouraging counsel to interview diligently all potential witnesses. Skillful questioning by counsel may elicit information uncovered by earlier depositions or interviews and may provide counsel with a means of impeaching the witness's testimony at trial. The underlying threat of discovery also encourages the adverse attorney to protect his privacy by soliciting cooperation from the witnesses, especially employees of the party he represents.<sup>292</sup>

d. *Evidence Impeaching a Witness.* If a party can show a strong possibility that material discrepancies exist between statements in a witness's deposition and a prior statement by the witness, or that the witness's testimony at trial will differ from assertions in his depositions or other statements, courts will permit discovery.<sup>293</sup> The origin of this characterization dates back to *Hickman*, where the Court, in detailing instances of discoverability, said that "[the documents] might be useful for purposes of impeachment or corroboration."<sup>294</sup> Courts, however, seek to prevent abuse of this discovery tool by requiring that the alleged discrepancies be major,<sup>295</sup> or sufficient to impeach the witness. Counsel cannot merely allege the discrepancies—he must show a strong possibility that they exist; more than "mere surmise or suspicion" is needed.<sup>296</sup>

This characterization implements the substantial need factor in particular; counsel able to discredit a major portion of the opposing counsel's proof only if a court permits discovery of impeachment materi-

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posed or interviewed and shown to be hostile or evasive, the fact of employment buttresses the showing of undue hardship. Courts are sensitive to the heightened possibility of a "conspiracy of silence" among employees, but look for proof of this possibility in interviews or depositions.

<sup>291</sup> By requiring proof of hostility, courts prevent counsel from developing a shortcut through the three-part standard that would subvert the policies underlying work product protection.

<sup>292</sup> This is especially true where house counsel can motivate the employer to encourage cooperation. *See, e.g., In re Grand Jury Investigation (Sun)*, 599 F.2d 1224 (3d Cir. 1979); *Xerox Corp. v. IBM*, 64 F.R.D. 367 (S.D.N.Y. 1974) (court ordered IBM to produce notes of interviews with IBM employees when they were unable to recall needed information on deposition by Xerox, noting possibility that statements of employees yet to be interviewed by IBM would be discoverable if those employees were also uncooperative). Counsel can, however, request the employees to refrain from giving information to the opposing party. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(f) (Final Draft 1983).

<sup>293</sup> *See Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam) (court examined witness's allegedly conflicting grand jury testimony and deposition and ordered production of prior statement of witness because of material discrepancies), *aff'd mem. by an equally divided court*, 400 U.S. 384 (1971); *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *Condon v. Petacque*, 90 F.R.D. 53 (N.D. Ill. 1981); *Young v. UPS*, 88 F.R.D. 269 (D.S.D. 1980); *Augenti v. Cappellini*, 84 F.R.D. 73 (M.D. Pa. 1979).

<sup>294</sup> 329 U.S. at 511.

<sup>295</sup> *See, e.g., Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 978 (E.D. La. 1974).

<sup>296</sup> *Hauger v. Chicago, R.I. & P.R.R.*, 216 F.2d 501, 508 (7th Cir. 1954).

als clearly has a substantial need for the information. The level of showing required satisfies the *Hickman* policy concerns by balancing counsel's need for a zone of privacy in which to prepare for trial with opposing counsel's need for evidence not readily available.

e. *Minor Characterizations: Plaintiff Unable to Engage Counsel; Lapse of Time; and Expense of Discovery.* These three minor characterizations—plaintiff unable to engage counsel, lapse of time, and expense of discovery—occur rarely and, standing alone, are not sufficient to satisfy the rule's standard. A plaintiff's inability to engage counsel typically arises when he has been in an accident that incapacitates him for an extended period of time,<sup>297</sup> during which defendant's counsel may obtain an unfair advantage in investigating the claim. Further, the plaintiff may suffer undue hardship unless discovery is ordered because of the unavailability of substantially equivalent materials. The plaintiff's apparent hardship dims, however, when one considers that few accident victims visit a lawyer immediately after the accident.

This characterization, because it occurs rarely, has received little treatment in either cases or commentary. When such cases have arisen, the courts have indicated that unless the justifications embodied in the discovery of a contemporaneous statement accompany this characterization, they will not allow discovery.<sup>298</sup> The characterization eliminates only the question of the attorney's diligence, because there was no attorney to be diligent. In sum, this characterization merely buttresses a showing of undue hardship but is alone insufficient to justify discovery of protected materials.

The second minor characterization, lapse of time, is also closely related to contemporaneity. Lapse of time between the incident and the discovering party's deposition of a witness does not satisfy any of the rule 26(b)(3) requirements unless the movant can show the witness's lack of recall.<sup>299</sup> A lapse of time does not automatically raise a presumption that the discoveror cannot obtain the substantial equivalent of the information contained in an earlier statement. Often, a court will question the diligence of an attorney who permitted several years to pass without deposing necessary witnesses.<sup>300</sup>

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<sup>297</sup> See *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 50-51 (4th Cir. 1963) (plaintiff unable to employ counsel for "many weeks" due to his injuries); *Almaguer v. Chicago, R.I. & P.R.R.*, 55 F.R.D. 147 (D. Neb. 1972) (plaintiff could not retain counsel for two months).

<sup>298</sup> For example, in *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963), the court also found that the statements defendant acquired were contemporaneous with the incident giving rise to the claim and ordered discovery.

<sup>299</sup> See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971); *Almaguer v. Chicago, R.I. & P.R.R.*, 55 F.R.D. 147 (D. Neb. 1972); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962).

<sup>300</sup> See *Almaguer v. Chicago, R.I. & P.R.R.*, 55 F.R.D. 147, 150 (D. Neb. 1972) (requiring

Finally, parties frequently urge that the expense of discovery constitutes undue hardship. This argument takes three forms: the discovering party is unable to pay for necessary discovery; the discovery would be duplicative and wasteful because the other party has already conducted the same investigation; and the cost of discovery is so exorbitant as to be unduly burdensome. The first argument has succeeded only once—over thirty years ago—in a case involving unique circumstances.<sup>301</sup> The argument fails because alleging a right to discovery based on one's poverty amounts to claiming an equal protection right that the courts do not recognize.<sup>302</sup> The second argument is also unpersuasive because in the adversary system duplicative investigation is the norm, not the exception.<sup>303</sup> The work product doctrine assumes that any waste resulting from having two diligent attorneys investigate the case rather than one is far outweighed by the benefits accruing to the adversary system from such practice.<sup>304</sup> The third expense-related theory is more complex; although some courts have held that "the cost [of discovery] may be inquired into as a factor in the undue hardship analysis,"<sup>305</sup> others use expense as the sole factor.<sup>306</sup> These latter courts make expense the determinative factor in mistaken reliance on the Supreme Court's recommendation in *Herbert v. Lando* that lower courts restrain "undue and uncontrolled discovery"<sup>307</sup> and construe the discovery provisions "to secure the just, *speedy* and *inexpensive* determination of every action."<sup>308</sup> The *Herbert* Court suggested that courts either apply strictly the rele-

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"some diligence on the part of the plaintiff," and because counsel did not advance an explanation for failure to take deposition earlier, undue hardship not proven).

<sup>301</sup> *Naylor v. Isthmian S.S. Co.*, 10 F.R.D. 128, 129 (S.D.N.Y. 1950) (widow's financial distress held sufficient to compel production of witness statements where judge had previously moved trial date forward: "[T]he court fears that if the discovery is not granted the widow may either have to proceed to trial ill-prepared or lose her preference [for an early trial]. This hard choice, it seems to the court, constitutes sufficient cause within the rule . . .").

<sup>302</sup> *See, e.g., In re LTV Sec. Litig.*, 89 F.R.D. 595, 616-17 (N.D. Tex. 1981).

<sup>303</sup> *See, e.g., M. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION* 17-30 (1979); *cf. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

<sup>304</sup> *See In re LTV Sec. Litig.*, 89 F.R.D. 595, 616 (N.D. Tex. 1981) ("Potential duplication of effort and cost is implicit in every application of the work-product rule."); *see also Developments, supra* note 2, at 1034 ("Though substantial duplication of effort may result [from denial of discovery of factual work product] the thrust of the work product doctrine seems to be that it is better for the adversary system to have two diligent attorneys than to have only one.").

<sup>305</sup> *See In re International Systems & Control Corp. Sec. Litig.*, 693 F.2d 1235, 1241 (5th Cir. 1982).

<sup>306</sup> *See Walker v. UPS*, 87 F.R.D. 360, 361 (E.D. Pa. 1980); *Chason v. Research-Cottrell, Inc.*, 29 Fed. R. Serv. 2d (Callaghan) 1459 (S.D. Ala. 1980).

<sup>307</sup> 441 U.S. 153, 176-77 (1979).

<sup>308</sup> *Id.* at 177 (emphasis in original). These decisions overlook the context of this language and the Court's explicit direction. The *Herbert* Court noted the existence of "mushrooming litigation costs, [mostly] due to discovery . . . . There have been repeated expressions of concern about undue and uncontrolled discovery . . . ." *Id.* at 176 (emphasis added). The *Chason* and *Walker* decisions, however, ignore the language immediately following: "But until and unless there are major changes in the present Rules of Civil Procedure, reliance must be

vance requirement under rule 26(b)(1) or use their power under rule 26(c) to protect persons from "annoyance, embarrassment, oppression, or undue burden or expense."<sup>309</sup> *Herbert*, however, is clearly inappropriate in the work product discovery context. Rule 26(b)(3) incorporates the relevance requirement of 26(b)(1) and also establishes a standard that ensures the additional vigilance recommended in *Herbert*.<sup>310</sup> Furthermore, the *Herbert* directive is aimed at discovery abuse, a factor not at issue in the cases deciding whether to order discovery of work product because of possible duplication and expense.<sup>311</sup> Finally, courts should not prevent discovery abuse by dismembering established discovery immunities that serve independent policy concerns.<sup>312</sup>

f. *Conclusion.* The various characterizations of recurring circumstances that give rise to work product immunity cover most situations in which there is a discovery dispute. However, these characterizations must never become the sole reason for permitting or denying discovery. The characterizations are justified only to the extent that they embody rule 26(b)(3)'s three-part test and its underlying policy justifications.

#### 4. *Application of Rule 26(b)(3) to Ordinary Work Product: Exceptions to Ordinary Work Product Immunity*

Rule 26(b)(3)'s provisions allowing parties and witnesses to obtain copies of their own statements without the required showing is an exception to the rule's general provisions.<sup>313</sup> The rule first provides that "[a] party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party."<sup>314</sup> Before the 1970 amendments to the Federal Rules, courts were divided over a party's ability to secure production of his own statement without

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had on what in fact and in law are ample powers of the district judge to prevent abuse." *Id.* at 176-77.

<sup>309</sup> *Id.* at 177 (quoting FED. R. CIV. P. 26(c)).

<sup>310</sup> Federal Rule of Civil Procedure 26(b)(3) provides that "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule [relevance requirement] . . . ." It then sets out the three-part standard which balances the need of the individual for the requested discovery against the adversary systems' interest in protecting work product.

<sup>311</sup> The Court focused on discovery abuse, and Justice Powell's concurrence emphasized this focus. 441 U.S. at 179.

<sup>312</sup> *Herbert v. Lando* provides no support for such action, and there has been no change in the rules affecting work product immunity that would warrant it. See C. WRIGHT, *supra* note 270, at § 83.

<sup>313</sup> The Advisory Committee noted that "an exception to the requirement of [rule 26(b)(3)] enables a party to secure production of his own statement without any special showing." FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2027, at 232 (exception created when party can obtain his own statement without required showing).

<sup>314</sup> FED. R. CIV. P. 26(b)(3).

any special showing.<sup>315</sup> Because the 1970 amendments eliminated former rule 34's "good cause" requirement<sup>316</sup> and made clear that rule 26(b)(3) did not require a showing for discovery of a party's statement, very few recent cases treat the subject.<sup>317</sup> Of the cases that have, many adopt the Advisory Committee's suggestion that a party be required to submit to a deposition before he can receive a copy of his statement.<sup>318</sup>

The Advisory Committee outlined two related policies supporting rule 26(b)(3)'s exception for party statements. First, the Committee noted that "[c]ourts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence."<sup>319</sup> Because the discovery rules are designed to permit disclosure of all admissible evidence, the fact that a party's own statement constitutes substantive evidence, admissible as an admission, justifies the special treatment afforded party statements under rule 26(b)(3).<sup>320</sup>

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<sup>315</sup> The dispute concerned the "good cause" requirement of the pre-1970 rule 34. See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502-03 (1970) (discussing conflicting cases concerning production of party's own statement). Compare *Safeway Stores, Inc. v. Reynolds*, 176 F.2d 476, 477-78 (D.C. Cir. 1949) (denying parties' motions for production of own statement on ground that rule 34 required showing of "good cause" before party could obtain own previously made statement) and *Shupe v. Pennsylvania R.R.*, 19 F.R.D. 144, 145 (W.D. Pa. 1956) (same) and *Helverson v. J.J. Newberry Co.*, 16 F.R.D. 330, 335 (W.D. Mo. 1954) (same) with *Straughan v. Barge MVL No. 802*, 291 F. Supp. 282, 284 (S.D. Tex. 1968) (mere fact that party has given statement to adversary and adversary has refused to make copy available is sufficient showing of good cause under rule 34) and *Smith v. Central Linen Serv. Co.*, 39 F.R.D. 15, 18 (D. Md. 1966).

<sup>316</sup> See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 500, 526 (1970); *supra* notes 153-55 and accompanying text.

<sup>317</sup> See, e.g., *Nelson v. Puerto Rico Marine Management, Inc.*, 72 F.R.D. 637, 637 (D. Md. 1976); *Smith v. China Merchants Steam Navigation Co.*, 59 F.R.D. 178, 179 (E.D. Pa. 1972); *Dingler v. Halcyon Lijn N.V.*, 50 F.R.D. 211, 213 (E.D. Pa. 1970); see also *Phelps v. Commissioner*, 62 T.C. 513, 516 (1974) (Tax Court rule 70(c) entitling party to obtain copy of own statement merely on showing that he lacks copy and has no other convenient means of obtaining one was derived from rule 26(b)(3)).

<sup>318</sup> See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970) ("In appropriate cases the court may order a party to be deposed before his statement is produced."). For example, in *Smith v. China Merchants Steam Navigation Co.*, 59 F.R.D. 178 (E.D. Pa. 1972), the plaintiff moved for a protective order to delay the taking of his deposition by the defendant until after the plaintiff received a copy of a statement he made following the accident at issue. The court denied the motion on the ground that the defendant had a legitimate interest in receiving the plaintiff's unrefreshed version. *Id.* at 179.

<sup>319</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970).

<sup>320</sup> *Dingler v. Halcyon Lijn N.V.*, 50 F.R.D. 211 (E.D. Pa. 1970) (granting plaintiff's motion for production of own prior statement and denying plaintiff's motion for production of witnesses's statements). The court in *Dingler* justified its differing treatment of party and witness statements by reference to the policy behind rule 26(b)(3): "[T]he discovery rules are aimed at permitting the disclosure of at least all admissible evidence, and a party's own statement constitutes substantive evidence, admissible as an admission." *Id.* at 213. In granting discovery of the plaintiff's prior statement, the court also noted that because the defendant had already taken the plaintiff's deposition, no unfairness due to loss of impeachment value resulted from allowing the plaintiff to discover his prior statement. *Id.* See also *Straughan v. Barge MVL No. 802*, 291 F. Supp. 282, 285 (S.D. Tex. 1968) (ordering production of party's

The rule 26(b)(3) exception for party statements also ameliorates the potentially unfair effects of Federal Rule of Evidence 801(d)(2)(A), which now provides that a party's statement is not hearsay and is admissible against him at trial.<sup>321</sup> The Federal Rules of Evidence Advisory Committee commented that admissions by a party-opponent were not hearsay because their admissibility in evidence was the result of the adversary system, not any special guarantee of trustworthiness.<sup>322</sup> However, the Federal Rules of Civil Procedure Advisory Committee recognized that, as a practical matter, a party often makes statements before he has retained counsel without realizing the legal consequences of making them.<sup>323</sup> Thus, because the opposing party may have unfairly extracted damaging admissions,<sup>324</sup> the rule 26(b)(3) exception facilitates pretrial disclosure of prior statements.

The Advisory Committee's second concern flows from the first: "[d]iscrepancies between [a party's] trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve."<sup>325</sup>

Because a party's statement is usually a summary and not a verbatim account, inaccuracies or shifts in emphasis in the party's version of the facts are common.<sup>326</sup> Jurors tend to be greatly influenced by party admissions. Disclosure is therefore necessary to allow a party to refresh his memory and fairly explain any discrepancies between his testimony

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statement because opposing party had opportunity to protect statement's impeachment value by deposing party).

<sup>321</sup> Federal Rule of Evidence 801(d)(2)(A) provides: "A statement is not hearsay if — . . . [t]he statement is offered against a party and is . . . his own statement."

<sup>322</sup> FED. R. EVID. 801(d)(2)(A) advisory committee note.

<sup>323</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970) ("Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage."). Some courts have echoed this concern. *See, e.g.,* Belback v. Wilson Freight Forwarding Co., 40 F.R.D. 16, 17 (W.D. Pa. 1966) (good cause shown under rule 34 for production of plaintiff's statements because statements taken before plaintiff retained counsel).

<sup>324</sup> *See, e.g.,* Parla v. Matson Navigation Co., 28 F.R.D. 348, 349 (S.D.N.Y. 1961) (where a statement is taken long before institution of suit and retention of counsel, pretrial disclosure of statement should be made because one party may have unfairly extracted damaging admissions).

<sup>325</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970); *see* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2027, at 236; *see also* Phelps v. Commissioner, 62 T.C. 513, 519 (1974):

Petitioners' testimony at the trial also may differ in some respects from both the memoranda [held to be a party's statement] and such answers to interrogatories. The result could well be that these inconsistencies would be so magnified as to impede the search for truth, and the trial would be concerned too much with the inconsistencies of peripheral details rather than with the heart of the issue.

<sup>326</sup> *See* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2027, at 236.

and the prior statement.<sup>327</sup> On the ground of fairness, therefore, courts should order production of a party's statement.<sup>328</sup>

Rule 26(b)(3) has another internal exception involving nonparty statements: "Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person." The Advisory Committee note supporting this provision simply asserts: "Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness."<sup>329</sup> The nonparty statement exception to rule 26(b)(3)'s showing requirement is another equitable response to the needs of the parties, rather than a response to the needs of the nonparty witness. Nonparties will not have as much motivation as parties to discover their previously made statements; although nonparty witnesses will want to testify truthfully at trial, they are not likely to be overly concerned about impeachment. Although most nonparties will not care whether they can discover their previously made statements, parties will want to discover statements made by their own witnesses.<sup>330</sup>

There are two primary reasons why a party may seek discovery of his witness's prior statements. First, a nonparty's statement, like a party's statement, is typically a summary, not a verbatim account, and may contain inaccuracies or changes in emphasis.<sup>331</sup> Prior inconsistent statements may be used at trial to impeach a witness, and jurors hearing impeaching testimony may attach undue significance to discrepancies between a witness's prior statements and his testimony at trial. A party, upon discovery of that which the adversary claims to be a prior statement, may find that his adversary's claim is inaccurate and may prepare to rebut the impeachment.<sup>332</sup> Should the allegedly inconsistent statement prove in fact to be a prior statement of the witness, it seems fair to

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<sup>327</sup> See *Developments, supra* note 2, at 1039 (1961) ("[T]he tendency of jurors to be unduly influenced by such admissions makes it important for a party to be aware of the extent to which he has committed himself so that he may honestly explain them.").

<sup>328</sup> See, e.g., *Straughan v. Barge* MVL No. 802, 291 F. Supp. 282, 285 (S.D. Tex. 1968) ("[C]onsistent with the purpose of the Federal Rules and in terms of fairness, plaintiff's counsel should be allowed to see the statement given by his client.") (footnote omitted).

<sup>329</sup> FED. R. CRV. P. 26 advisory committee note, 48 F.R.D. 487, 503 (1970).

<sup>330</sup> One commentator noted that under rule 26(b)(3)

[a] party may obtain his statement, a non-party may obtain his statement, but neither may obtain the other's statement without [a] showing. The practical result will be that a party will seek to avoid the Rule 26(b)(3) standards by urging friendly witnesses to request their own statements for delivery to the party.

Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 63 n.25 (1971). This comment may explain the lack of litigation and policy explanations for the nonparty-statement exception.

<sup>331</sup> See, e.g., *Goings v. United States*, 377 F.2d 753, 762 n.13 (8th Cir. 1967) ("[M]ost ex parte statements reflect the subjective interest and attitude of the examiner as well.") (discussing witness statements taken for criminal trial).

<sup>332</sup> See *Developments, supra* note 2, at 1038.



give the witness an opportunity to conform his trial testimony to the true statement and explain any inconsistencies.<sup>333</sup>

Memory refreshment, the second primary reason why a party may seek discovery of his witness's prior statement,<sup>334</sup> justifies both the party and nonparty statement exceptions.<sup>335</sup> Allowing a witness to use his prior statements to refresh his memory and enable him to testify truthfully at trial seems equitable to both parties.<sup>336</sup> It is fair to the adverse party who, if he has a copy of the witness's statement, can ensure that the witness's memory is actually refreshed and that he is testifying truthfully. If the adverse party has not received a copy of a statement used to refresh a witness's memory, he is entitled to have the statement produced and to inspect it under Federal Rule of Evidence 612.<sup>337</sup> Thus, the memory-refreshment procedure can justify disclosure of a witness's prior statements or other ordinary work product. However, the memory-refreshment rationale can be abused in two ways. First, a court may use the work product doctrine incorrectly to shield materials that were in fact used to refresh a witness's memory. Second, a court may apply Federal Rule of Evidence 612 too broadly, forcing one side to divulge

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<sup>333</sup> Federal Rule of Evidence 613(b) underscores the idea of fairness in impeaching witnesses about their prior statements: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require."

However, another rule of evidence, 613(a), appears to conflict with rule 26(b)(3) and a policy of fairness to parties and witnesses. *See* 10 J. MOORE & H. BENDIX, *MOORE'S FEDERAL PRACTICE* § 613.02 at VI-212 (3d ed. 1982) (Federal Rule of Evidence 613(a) and Federal Rule of Civil Procedure 26(b)(3) are inconsistent). Federal Rule of Evidence 613(a) allows for temporary suspension of rule 26(b)(3), providing: "[i]n examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel." Thus, a witness can obtain a copy of his prior statement under rule 26(b)(3), but, at the trial itself, the adverse party may cross-examine the witness without showing him his prior statement. "Consistency between the two rules is thus present only when discovery has been terminated before the witness has obtained a copy of his prior statement." 10 J. MOORE & H. BENDIX, *supra*, § 613.02, at VI-213. Nevertheless, the Advisory Committee declares, without explanation, that rule 613(a) does not defeat the provisions of rule 26(b)(3). *See* FED. R. EVID. 613(a) advisory committee note.

<sup>334</sup> *See Developments, supra* note 2, at 1038.

<sup>335</sup> Although this discussion is framed in terms of witnesses' prior statements, it is also applicable to parties' prior statements. *Id.* at 1039.

<sup>336</sup> FED. R. EVID. 612 advisory committee note ("The purpose of the rule is . . . to promote the search of credibility and memory.")

<sup>337</sup> Federal Rule of Evidence 612 provides:

if a witness uses a writing to refresh his memory for the purpose of testifying, either —

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

materials protected by work product immunity that were not actually used for memory refreshment.

*Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>338</sup> provides an example of erosion of the work product doctrine through memory-refreshment disclosures. In *Berkey*, the plaintiff sought discovery of certain notebooks prepared by defense counsel and provided to defense expert witnesses. A magistrate ordered production of the notebooks pursuant to Federal Rule of Evidence 612, but the district court overruled, finding the notebooks protected by the work product immunity of rule 26(b)(3).<sup>339</sup> The court indicated, however, that it would grant similar discovery motions in the future, stating that "materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties."<sup>340</sup>

The *Berkey* court properly hoped to prevent one type of abuse—the protection of refreshment materials from disclosure through excessive use of work product in preparing witnesses to testify.<sup>341</sup> The court nevertheless threatened to infringe upon work product immunity by failing to construe rule 612 narrowly. As one commentator noted, "a court can further erode the protection afforded to work product by ordering inspection of all such material the witness has seen, rather than only that material actually used to refresh the witness's memory."<sup>342</sup> Courts should therefore strictly construe the memory-refreshment doctrine to avoid the conflict with rule 26(b)(3) that occurred in *Berkey*.<sup>343</sup>

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<sup>338</sup> 74 F.R.D. 613 (S.D.N.Y. 1971).

<sup>339</sup> *Id.* at 617.

<sup>340</sup> *Id.* The court noted that "it is disquieting to posit that a party's lawyer may 'aid' a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance." *Id.* at 616. The court felt that it could allow future discovery "either on a theory of waiver or of qualified privilege." *Id.* at 617. One commentator has criticized the *Berkey* court for creating an "automatic rule" that would allow discovery of ordinary work product whenever it was used to refresh a witness's memory. Note, *Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules*, 88 YALE L.J. 390, 401 (1978). This commentator argued that rule 612 should not be transformed into a rule of discovery and that a showing of need or waiver under rule 26(b)(3) is "irrelevant to the showing of memory refreshment demanded by Rule 612." *Id.* at 401. For a general discussion of the waiver doctrine in relation to memory refreshment, see *infra* text accompanying notes 768-69.

<sup>341</sup> See Note, *supra* note 340, at 402; *infra* note 763 and accompanying text.

<sup>342</sup> Note, *supra* note 340, at 398.

<sup>343</sup> Moreover, courts should carefully protect opinion work product, even if it is used to refresh a witness's memory. See *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 780-81 (S.D.N.Y. 1982) (holding that work product immunity outweighed policy of disclosure underlying rule 612(2)). The *Al-Rowaishan* court adopted Professor Weinstein's approach in protecting the opinion work product:

If the adverse party demands material which the party producing the witness claims reflects solely the attorney's thought processes, the judge should examine the material *in camera*. Unless the judge finds that the adverse party would be hampered in testing the accuracy of the witness' testimony, he should not order production of any writings which reflect solely the attorney's mental processes.

## D. Opinion Work Product

### 1. Definition and Scope of "Opinion" or "Core" Work Product

Rule 26(b)(3) provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."<sup>344</sup> This protected material is generally called "opinion" work product.<sup>345</sup> Opinion work product is distinct from opinions contained in work product materials. Any document or tangible thing containing opinions is classified as opinion work product. Courts may order excision of opinions in a document or review a document in camera to isolate opinion portions, thus rendering the purged document ordinary work product.<sup>346</sup> However, as long as the document contains an attorney's mental impressions, conclusions, or opinions, the document itself,

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*Id.* at 780 (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 612[04], at 612-40 (1982)).

<sup>344</sup> FED. R. CIV. P. 26(b)(3). The inclusion of "legal theories" within the rule's definition of opinion work product can be misleading. Legal theories, when entwined with an attorney's legal strategy, opinions, or conclusions, are protected. However, legal theories, like facts, are not protected as work product when not contained within work product materials. For instance, a party may discover through interrogatory or deposition whether his opponent will rely on *res ipsa loquitur* in prosecuting his case. *See supra* text accompanying note 475. When the legal theory is contained within a protected document, it may be excised. *See infra* note 336. When the legal theory sought is one applied to the facts, however, the discovery issue becomes more complex. *See infra* note 382.

<sup>345</sup> *See In re Murphy*, 560 F.2d 362, 329 n.1 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

<sup>346</sup> Some courts have been willing to perform an in camera review of the disputed material to determine if, or to what extent, the disputed material contains opinion work product. *See Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Natta v. Zletz*, 418 F.2d 633 (7th Cir. 1969); *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *In re International Systems & Controls Sec. Litig.* 91 F.R.D. 552 (S.D. Tex. 1981), *vacated on other grounds*, 693 F.2d 1235 (5th Cir. 1982); *Chason v. Research-Cottrell, Inc.*, 29 Fed. R. Serv. 2d (Callaghan) 1459 (S.D. Ala. 1980); *Insurance Co. of N. Am. v. Union Carbide Corp.*, 35 F.R.D. 520 (D. Colo. 1964).

Courts also use in camera review to permit excision of the opinion parts of work product if discovery of the document is ordered. *See In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10 (D. Md. 1980); *United States v. Chatham City Corp.*, 72 F.R.D. 640, 642 n.1 (S.D. Ga. 1976) ("I made clear that mental impressions of the . . . attorneys were not disclosable. . . . These could be winnowed, I suggested, by an *in camera* examination by the Court."); *Xerox Corp. v. IBM*, 64 F.R.D. 367 (S.D.N.Y. 1974).

The Federal Rules of Civil Procedure do not provide for in camera review, but the Advisory Committee obliquely referred to this practice in its notes. FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970). The Committee's reference does not, however, specify procedures or methods. Uneven application has resulted. Some courts have employed special masters to determine the existence of opinion work product in a document, *see, e.g., In re Murphy*, 560 F.2d 362 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975), and to excise the mental impressions, conclusions, and legal theories of the attorney, converting the document into ordinary work product, *id.* at 736 (dicta). *But cf. Xerox Corp. v. IBM*, 64 F.R.D. 367,

not just the opinion matter within it, is classified as opinion work product.

Opinion work product includes an attorney's legal strategy,<sup>347</sup> such as his intended lines of proof<sup>348</sup> and cross-examination plans.<sup>349</sup> It encompasses an attorney's evaluation of the strengths and weaknesses of his case<sup>350</sup> and the inferences he has drawn from interviews of wit-

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381-82 (S.D.N.Y. 1974) (court unable to excise all opinion work product, so ordered discovery of all materials).

The in camera device seems an ideal compromise between the desire to protect legal strategy and the need for discovery of certain essential documents. It permits the discoveror to obtain work product documents after showing the requisite need and hardship for ordinary work product discovery, yet does not allow the discoveror to "rely on his opponents' wits." *Hickman*, 329 U.S. at 516 (Jackson, J., concurring). In practice, however, the in camera device has created problems because no standard procedures have been created to regulate its use.

The ad hoc nature of in camera viewing presents two problems. First, the lack of defined procedures has led to judicial abuse and irregular use of the in camera device. Courts give special masters varying powers to deal with the work product: some special masters merely make suggestions about the existence of opinion work product, others edit the material to excise opinion work product. Judges may rely on the special masters to make substantive decisions of law regarding the work product. The uncertainty of the standard for opinion work product discovery complicates the use of special masters: if courts do not know the standards, how should a special master make the same decision? Thus, authority is delegated to the special masters without institutional controls.

If the trial judge views the work product, either ab initio or to review the special master's recommendations, he could be prejudiced by the content. Fortunately, most judges seem to realize this problem and generally a different judge hears discovery motions and views the work product.

The second difficulty posed by the ad hoc nature of in camera viewing is the possibility that decisions based on in camera viewing will be mistakenly viewed as applications of a lower standard for opinion work product. Judges may interpret precedent permitting discovery of purged materials (now ordinary work product) as indicative of the opinion work product standard, resulting in mere ordinary work product protection for opinion work product.

A final problem with the in camera device arises when excision of the mental impressions is impossible. See *Xerox Corp. v. IBM*, 64 F.R.D. 367 (S.D.N.Y. 1974). The ready availability and seeming equity of excision encourages courts to short-change materials that cannot be fully excised of opinion work product. These materials, having passed the lower ordinary work product standard, may be disclosed on a showing adequate only for ordinary work product. *Id.* at 381-82 (court ordered production where nonprivileged facts were inextricably intertwined with privileged information).

<sup>347</sup> See *In re Grand Jury Subpoena* Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980); *Parker v. Carroll*, 20 Fed. R. Serv. 2d (Callaghan) 698, 700 (D.D.C. 1974); Note, *Protection*, *supra* note 197, at 333 (term "opinion work product" equates loosely with attorney's strategy). Professor Cooper argues forcefully that adversarial strategy is the key concept underlying the work product doctrine, and that "[p]rotection against pretrial discovery of . . . trial plans . . . forms the hard core of the work product doctrine." Cooper, *supra* note 129, at 1295.

<sup>348</sup> See F. JAMES & G. HAZARD, *supra* note 191, § 6.10, at 198 (unwarranted disclosure of matters marshaled for trial can reveal attorney's intended lines of proof); Cooper, *supra* note 129, at 1296 ("[I]t is generally accepted that a party may not seek a statement of the evidence which will be offered at trial to prove each of his opponent's points."); Note, *Protection*, *supra* note 197, at 333.

<sup>349</sup> See Cooper, *supra* note 129, at 1296 ("[I]t would be surprising in the extreme if a party were ordered to . . . divulge cross-examination plans."); Note, *Protection*, *supra* note 197, at 333.

<sup>350</sup> See F. JAMES & G. HAZARD, *supra* note 191, § 6.10, at 198 (unwarranted disclosure of

nesses.<sup>351</sup> A counsel's ordering of facts and his marshaling, aligning, and indexing of empirical data and documents is also given immunity from discovery.<sup>352</sup> Even a mere compilation of facts may be protected under rule 26(b)(3) if it reflects an attorney's mental impressions.<sup>353</sup>

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work product can reveal attorney's evaluation of strengths and weaknesses of case); Note, *Protection*, *supra* note 197, at 333. Professor Cooper argues that allowing one party to take advantage of the other's assessment of his chances for victory or an acceptable settlement would intrude on the bargaining process and discourage voluntary settlement. Lawyers might formulate glowing prospects for success, thereby defeating and distorting the discovery process. "Such distortion would in turn inhibit actual settlement" because overly optimistic forecasts would heighten parties' expectations of large settlements. Cooper, *supra* note 129, at 1283.

<sup>351</sup> See Note, *Protection*, *supra* note 197, at 333. For example, interview memoranda or memoranda based on a witness's oral statement are entitled to special protection under rule 26(b)(3). See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (memoranda revealing attorney's mental processes and based on oral statements by witnesses specially protected by 26(b)(3)); *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976) (notes of conversations with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Although absolute protection for interview memoranda is questionable, see *infra* notes 362, 365-91 and accompanying text, the cases emphasize that rule 26(b)(3) protects interview memoranda whenever possible.

This treatment is warranted by "several unique and well-documented problems." *In re Grand Jury Investigation* (Sun), 599 F.2d 1224, 1231 (3d Cir. 1979).

First, [interview memoranda] may indirectly reveal the attorney's mental processes, his opinion work product. Second, their reliability as accurate reflections of the witness's statements is a function of many factors, including the conditions of the interview, the contemporaneousness of the writing, and the editorial discretion of the attorney. Third, discovery and use of such material creates a danger of converting the attorney from advocate to witness. Finally, the information contained in such memoranda generally is of limited utility, especially where the witness himself is readily available to the opposing party.

*Id.* Thus, although these materials lie in the gray zone between ordinary and opinion work product, courts should continue to classify interview memoranda as opinion work product, granting such material special protection.

<sup>352</sup> See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (notebooks are work product "in the essential sense of the term [because] they are counsel's ordering of the 'facts,' referring to the prospective proofs, organizing, aligning, and marshaling empirical data with the view to combative employment that is the hallmark of the adversary enterprise"). However, protection of this material is not absolute:

The means of indexing and arranging the individual documents in the compilation . . . calls for a flexible work product analysis. If the documents were arranged in broad categories or if a nonparty indexed his own documents, the compilation would reveal little of the attorney's thoughts, and such a compilation should not receive any protection. In contrast, if an attorney arranged and indexed the documents in a manner that highlights their importance to his case, discovery of the compilation might expose much of the attorney's thinking, evaluation, and strategy to the other party. In this situation, the compilation should receive work product protection.

Note, *supra* note 184, at 1339.

<sup>353</sup> See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (notebooks reflecting legal judgment as to facts needed to be understood, mastered and possibly presented at trial were work product); see also Note, *supra* note 184, at 1339 ("Discovery of a compilation may reveal . . . the importance the attorney attaches to the documents. . . . If . . . the attorney selected documents after careful analysis, the compilation warrants work

The scope of the rule's protection, however, is not unlimited. Most courts hold that the "documents and tangible things" requirement also applies to an attorney's mental impressions, conclusions, opinions, or legal theories.<sup>354</sup> Moreover rule 26(b)(3) fails to protect opinion work product not prepared in anticipation of litigation<sup>355</sup> or the mental impressions and conclusions of witnesses.<sup>356</sup> Thus, opinion work product under rule 26(b)(3) encompasses a wide, but not unlimited, variety of materials reflecting the mental impressions, conclusions, or opinions of an attorney or other representative of a party.<sup>357</sup>

## 2. *Opinion Work Product Protection Standards*

*Hickman* and the 1970 amendments provide greater protection for opinion work product than for ordinary work product.<sup>358</sup> It is in the area of opinion work product that the concerns of *Hickman* are most pressing: the lawyer's need for privacy is greater when he is preparing his trial strategy than when he is just beginning his factual investigation; the problems presented by his being called as a witness apply predominantly to opinion work product;<sup>359</sup> and the protection accorded his

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product protection."). But if a party can meet the substantial need and undue hardship tests of rule 26(b)(3), ordinary work product contained in the compilation is discoverable. *See* Note, *supra* note 184, at 1333 n.49. The court may excise the opinion work product from the compilation. *See supra* note 346 and accompanying text.

<sup>354</sup> *See, e.g.,* Peterson v. United States, 52 F.R.D. 317, 320 (S.D. Ill. 1971) (rule 26(b)(3) only protects documents and tangible things). *But see infra* notes 479-83 and accompanying text (arguing that rule should also protect "intangibles").

<sup>355</sup> *See infra* notes 497-532 and accompanying text. In Peterson v. United States, 52 F.R.D. 317 (S.D. Ill. 1971), for example, the taxpayers formulated interrogatories seeking discovery of audits and field reports prepared by IRS employees and relating to the plaintiff's alleged tax over-payments. The court held that rule 26(b)(3) did not protect documents even though they contained mental impressions:

The language of 26(b)(3) clearly shows that protection afforded to mental impressions, conclusions, opinions or legal theories is limited to documents that are trial preparation material. The documents of which discovery is sought herein [are] not trial preparation material and thus are not protected by rule 26(b)(3) merely because they may contain mental impressions, conclusions, opinions, and legal theories.

*Id.* at 321; *see also* Abel Inv. Co. v. United States, 53 F.R.D. 485, 488 (D. Neb. 1971) (mere presence of mental impressions, conclusions, and legal theories within documents did not determine whether materials were in fact prepared in anticipation of litigation).

<sup>356</sup> *See* Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 403 (E.D. Va. 1975) (noting that "statements and documents which represent the mental impressions and observations of the witness and not those of the attorney or his investigators, are not part of the attorney's 'work product'").

<sup>357</sup> *See id.* at 402 ("[T]he impressions, observations and opinions of a person hired by an attorney . . . are part of his 'work product.'"); *see also* FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970) ("The courts have steadfastly safeguarded against disclosure of lawyer's mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents.").

<sup>358</sup> *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 400 (1981) ("Rule 26 accords special protection to work product revealing the attorney's mental processes.").

<sup>359</sup> *But see, e.g.,* Cooper, *supra* note 129, at 1277 ("This fancied danger does not require

strategy should exceed the privacy given the facts in his files. Furthermore, opinion work product protection does not interfere with the policies underlying liberal discovery because the discovery devices were designed to facilitate discovery of facts, not issues or strategies.<sup>360</sup> As rule 26(b)(3) uses the term, discovering parties simply do not "need" disclosure of opinion work product as much as facts.<sup>361</sup>

Although rule 26(b)(3) clearly establishes a two-tier standard and defines the requirements for discovery of ordinary work product, the standard for opinion work product protection continues to be hotly contested. The *Hickman* decision and the rule can both be interpreted in different ways and supported with a variety of policy arguments. Some courts interpret *Hickman* to require absolute protection of opinion work product,<sup>362</sup> a minority employ a balancing test to determine discoverability,<sup>363</sup> and a growing number adhere to a strict protection standard.<sup>364</sup> The following discussion illustrates that a strict protection standard best conforms to Supreme Court precedent and the policies underlying *Hickman* and rule 26(b)(3).

a. *Absolute Standard.* An absolute standard requires the court to deny all discovery of opinion work product. Advocates of this standard point to absolute language in *Hickman v. Taylor*<sup>365</sup> and rule 26(b)(3) to support their contention.<sup>366</sup> This language, however, when read in context and analyzed in light of pre-*Hickman* and pre-amendment history, reveals that neither *Hickman* nor rule 26(b)(3) mandates the absolute standard that a superficial reading may suggest.

Proponents of an absolute standard rely heavily on the *Hickman*

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extended discussion, however, for the remedy is as obvious as the danger itself—discovery could be allowed, subject to an absolute bar against using the discovered material at trial for any purpose.”).

<sup>360</sup> See James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1479 (1958) (“[T]he deposition-discovery devices were intended to reach information and not claims or contentions.”); see also *id.* at 1478-79.

<sup>361</sup> Although a lawyer's strategy is valuable to his opponent, the opponent cannot meet rule 26(b)(3)'s standard of need: knowledge of an opponent's strategy is not essential to the preparation of one's case.

<sup>362</sup> See *infra* notes 365-91 and accompanying text.

<sup>363</sup> See *infra* notes 392-403 and accompanying text.

<sup>364</sup> See *infra* notes 404-23 and accompanying text.

<sup>365</sup> 329 U.S. at 512-13.

<sup>366</sup> See *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (“In our view, no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories. This is made clear by the Rule's use of the term 'shall' as opposed to 'may.'”); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 14 (D. Md. 1980); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 949 (E.D. Pa. 1976); *Burke v. United States*, 32 F.R.D. 213, 217 (E.D.N.Y. 1963) (pre-amendment interpretation of *Hickman* as requiring absolute immunity of attorney's mental processes); C. WRIGHT, *supra* note 270, at 82 (4th ed. 1983) (interpreting rule 26(b)(3) and *Duplan* to require absolute protection).

Court's statement that "we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production."<sup>367</sup> Yet this oft-cited quotation is misleading without considering the opinion as a whole, as well as the context of the case. The Court went on to say, "[i]f there should be a rare situation justifying production of these materials, petitioner's case is not of that type,"<sup>368</sup> thus suggesting that the holding does not mandate absolute protection of opinion work product. Because the petitioner claimed discovery as of right without showing any need for the materials, the Court did not consider seriously what justification could be sufficient to necessitate production.

The Court's prior rejection of a proposed amendment to rule 30(b)<sup>369</sup> that would have provided absolute protection for opinion work product reinforces the view that *Hickman* does not require an absolute approach. One commentator has even suggested that the Court's rejection of that proposed amendment, combined with the subsequent *Hickman* decision, means that opinion work product should not be absolutely protected.<sup>370</sup> This argument is of questionable validity, however, in light of the *Hickman* Court's announced preference for a case-by-case analysis of protection.<sup>371</sup> The Court seemed reluctant to establish a standard for opinion work product protection, preferring instead to keep its role as promulgator of the Federal Rules distinct from its role as judicial interpreter of those rules.<sup>372</sup>

The *Hickman* decision, together with the rejected amendment,

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<sup>367</sup> 329 U.S. at 512.

<sup>368</sup> *Id.* at 513.

<sup>369</sup> FED. R. CIV. P. 30(b) advisory committee note, 5 F.R.D. 433, 457-60 (1946) (final draft of proposed amendment). The proposed amendment provided:

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

*Id.* at 456-57.

<sup>370</sup> Comment, *supra* note 196, at 1162.

<sup>371</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 499 (1970) ("In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule.").

<sup>372</sup> 329 U.S. at 514 ("But until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right."). The Court's power to implement rules of civil procedure arises from a limited grant of power from Congress, *see* 28 U.S.C. § 2072 (1976), and is thus distinct from its judicial power to interpret those rules as exercised in *Hickman*. The nature and origin of these powers differ, and the *Hickman* court was careful not to blur the distinction.



should be interpreted as simply indicating the Court's preference. If the Court had wanted to adopt an absolute standard of protection, it could have adopted the proposed amendment to rule 30(b). The case-by-case approach, necessitated by *Hickman*, would not have been needed to clarify an absolute standard. Thus, the *Hickman* court did not positively desire an absolute standard. Furthermore, Justice Murphy's reference to "rare situation[s] justifying production of these matters" indicates strongly that such situations do exist.<sup>373</sup> In sum, the *Hickman* decision indicates that the Court leaned toward nonabsolute protection without requiring it.

The opinion work product section of rule 26(b)(3), when read in light of the case law and legislative history underlying it, also fails to set forth a clear standard. Rule 26(b)(3) states, "[t]he court *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."<sup>374</sup> Proponents of absolute opinion work product protection argue that elsewhere in the Federal Rules of Civil Procedure, the word "shall" is equivalent to the word "must," clearly indicating an absolute mandate.<sup>375</sup>

This textual argument is weakened considerably, however, by the Advisory Committee notes to rule 26(b)(3) which state that the rule should "conform to the holdings of the cases, when viewed in light of their facts."<sup>376</sup> Neither *Hickman* nor the cases following it mandated absolute protection for opinion work product. Because the Court continually denied certiorari on cases that might have clarified the *Hickman* rule,<sup>377</sup> lower courts developed their own analyses. Post-*Hickman* courts purporting to implement the decision actually applied varying standards ranging from absolute protection to a balancing approach.<sup>378</sup>

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<sup>373</sup> 329 U.S. at 513; see Note, *Protection*, *supra* note 197, at 339.

<sup>374</sup> FED. R. CIV. P. 26(b)(3) (emphasis added).

<sup>375</sup> For example, Federal Rule of Civil Procedure 13(a) provides in part that "a pleading shall state as a counterclaim", meaning that those types of counterclaims described are compulsory. See C. WRIGHT, *supra* note 270, at § 79; R. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 45-46 (4th ed. 1978). Federal Rule 7(a)'s requirement that "there shall be a complaint and an answer," is also mandatory. See C. WRIGHT, *supra* note 270, at § 66.

<sup>376</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 500 (1970); see also Note, *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROBS. 623, 629 (1972) (quoting Advisory Committee notes).

<sup>377</sup> See, e.g., *United States v. Leggett & Platt, Inc.*, 542 F.2d 655 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

<sup>378</sup> Absolute protection: *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y. 1963). Strict protection: *In re Natta*, 410 F.2d 187, 191 (3d Cir.), *cert. denied*, 396 U.S. 836 (1969); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979, 982 (E.D. Wis. 1969) (discussing work product in terms of balancing but requiring "a showing of exceptional circumstances [to] justify piercing the immunity given under [*Hickman*]"); *Insurance Co. of N. Am. v. Union*

The sparse and inconsistent legislative history of the opinion work product section of rule 26(b)(3) also fails to either demonstrate a clear intent to change the standard to the absolute form suggested by the text of the rule, or indicate what standard courts should implement.

The 1970 amendment to rule 26 was prompted by confusion over the interpretation of *Hickman* and the use of the "good cause" requirement of rule 34.<sup>379</sup> The rule's drafters, in seeking to codify *Hickman*, seem to have concentrated primarily on clarifying the standard for ordinary work product. In fact, there are some indications that the second sentence of rule 26(b)(3), dealing with opinion work product, was not as well thought out as the first sentence dealing with the standard for ordinary work product.<sup>380</sup> The opinion work product portion of the amendment, incorporated after the original draft, was not documented with any cases.<sup>381</sup> Also, the last paragraph of the Advisory Committee notes for the opinion work product section indicates an intent to alter the overall scope of protection by designating certain types of "mental processes" as discoverable.<sup>382</sup>

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Carbide Corp., 35 F.R.D. 520 (D. Colo. 1964). Balancing approach: *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971); *United States v. Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959).

<sup>379</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 499 (1970).

Prior to 1970, all movants for discovery had to demonstrate good cause under rule 34 to obtain any discovery orders. See *supra* note 149 and accompanying text. Although the *Hickman* decision did not include the phrase "good cause," courts applied the work product doctrine by determining first if "good cause" had been shown, and then deciding whether the requested materials constituted work product. If the court classified the documents as work product, it then required a greater degree of "good cause" than in normal discovery cases. The Advisory Committee noted the existence of "two verbally distinct doctrines . . . the 'good cause' requirement in Rule 34 . . . and the work product doctrine of *Hickman v. Taylor*. . . ." FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 499 (1970).

<sup>380</sup> For a discussion of this possibility, see Comment, *supra* note 196, at 1160-62.

<sup>381</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970).

<sup>382</sup> Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to facts but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

*Id.* Arguably, the mentioned amendments to rules 33 and 36 reduce much of opinion work product protection to a procedural step. The discovering party, however, must know what contentions to request in his interrogatories. Furthermore, the amendments to rules 33 and 36 are designed to eliminate the technical objection to an interrogatory that it requested application of law to facts, not just facts, "and thus could not be used for discovery." The Advisory Committee noted the frequency of these objections and the usefulness of permitting discovery of mixed fact-law questions to narrow the issues. FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 523-24 (1970).

These amendments are not directed at pure opinion work product but at the gray area of mixed ordinary and opinion work product, where, the Committee seems to feel, facts domi-

The discrepancies between the text of the rule and the Advisory Committee notes further demonstrate the incomplete nature of the amendment regarding opinion work product. The notes reflect the Advisory Committee's intent to conform to case law, which they characterized as having "steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories."<sup>383</sup> Because pre-1970 case law rarely provided absolute protection, by incorporating that case law into the rule, the Committee apparently intended a strict but not absolute standard. Furthermore, the amendment was designed to codify *Hickman*, not to change it. In light of the absence of precedent supporting an absolute standard, if the drafters had intended to institute a new, complete bar to discovery of opinion materials, they would not have relied solely on case law. One must therefore read the seemingly absolute language of rule 26(b)(3) as either contradicting the note, or imperfectly expressing the drafters' intent.

In sum, the 1970 amendment failed to provide a clear standard for opinion work product protection; the language of rule 26(b)(3) and the accompanying notes have simply fueled the debate.<sup>384</sup> The confusion that existed among the courts before the 1970 amendment has continued. Courts still employ the three different standards,<sup>385</sup> and the Supreme Court refuses to clarify the issue.<sup>386</sup> Between 1970 and 1976, decisions favored an absolute standard, although few cases actually implemented it.<sup>387</sup> More recent decisions, however, favor a strict standard for opinion work product protection.<sup>388</sup>

When evaluated in light of the policies underlying the work product doctrine, the absolute standard proves unsatisfactory in many respects. For example, adopting a standard that protects attorney privacy beyond the extent necessary to protect the adversary system may im-

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nate opinions. Although these amendments effectively narrow the field of protectable opinion work product, they do not indicate any change in the standard for protection.

<sup>383</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970).

<sup>384</sup> See, e.g., Comment, *supra* note 196, at 1161-62.

<sup>385</sup> Absolute standard: *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943 (E.D. Pa. 1976). Balancing approach: *Xerox Corp. v. IBM*, 64 F.R.D. 367 (S.D.N.Y. 1974); *International Tel. & Tel. Corp. v. United Tel. Co.*, 60 F.R.D. 177 (M.D. Fla. 1973). Strict protection: *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *In re Grand Jury Investigation (Sun)*, 599 F.2d 1224 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977).

<sup>386</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) ("We do not decide the issue at this time.").

<sup>387</sup> See, e.g., *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976) (citing *Duplan's* absolute standard approvingly but concluding that nonopinion work product should be accorded only qualified protection), *cert. denied*, 430 U.S. 945 (1977).

<sup>388</sup> See, e.g., *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982) ("[T]o the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification.").

pede the search for truth. An occasional breach of secrecy will not undermine the *Hickman* goals of encouraging diligence of counsel and promoting thorough and accurate preparation by protecting attorney privacy.

Further, although a two-tier approach serves the policies of *Hickman*, it also encourages abuse if the standard for disclosure of opinion work product is substantially different from that of ordinary work product. If opinion work product is absolutely protected, attorneys will strive to define their work as opinion work product by infusing their factual notes with opinions,<sup>389</sup> thereby reducing the accuracy of their records. Attorneys will avoid procedures that objectify their work product, such as having witnesses sign or acknowledge statements.<sup>390</sup> Clear definitions of opinion work product and a moderately differentiated standard avoid these pitfalls.

Finally, absolute protection could discourage judges from applying the higher standard in cases of extreme need.<sup>391</sup> Although the absolute standard provides certainty of protection, if judges are reluctant to apply it, even less work product "certainly" will be covered.

b. *Balancing Standard.* A balancing test requires an individualized approach to every opinion work product discovery motion.<sup>392</sup> The judge decides whether protection is warranted by weighing the extent to which the lawyer's mental processes are reflected in the materials against the needs of the discovering party.<sup>393</sup> Courts using this approach recognize *Hickman*'s implicit balance but treat both the interest of the adversary system and the individual's interest in his case as dynamic. Thus, instead of measuring the party's need for the materials

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<sup>389</sup> See McGanney & Seidel, *Rule 26(b)(3): Protecting Work Product*, 7 LITIGATION No. 3, at 24, 26 (1981) (discussing tactic of infusing ordinary work product with opinion work product to prevent discovery but warning that courts may order production if they consider this a ploy).

<sup>390</sup> See *id.* More specifically, attorneys will have witnesses sign only favorable statements. Interview with Robert Baker, Esq., Hebb & Gitlin, P.C. (Oct. 31, 1982).

<sup>391</sup> "Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation." *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). If an absolute standard prevailed, the actual effect might be to reduce the protection afforded because judges would be less inclined to define material as opinion work product. Thus, materials falling within the gray area between pure ordinary work product and pure legal theories would receive less protection. Alternatively, Courts might develop numerous exceptions to an absolute rule.

<sup>392</sup> Note, *Discovery of Attorney's*, *supra* note 250, at 284; Note, *Discovery and the Work Product Doctrine*, 11 LOY. U. CHI. L.J. 863, 874 (1980); Note, *Protection*, *supra* note 197, at 344-45 (criticizing use of balancing).

<sup>393</sup> See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971); *Xerox Corp. v. IBM*, 64 F.R.D. 367 (S.D.N.Y. 1974); *International Tel. & Tel. Corp. v. United Tel. Co.*, 60 F.R.D. 177 (M.D. Fla. 1973).

against the fixed weight of the standard, these courts reevaluate the interests of the adversary system with each new discovery motion.<sup>394</sup>

Rather than grounding their argument on the language of *Hickman*, balancing test advocates base their interpretation on the theory that work product protection is a necessary impediment to truth-finding, necessary only to the extent that it protects the adversary system. Although this approach does provide flexible limits on work product protection, it achieves its goals at the expense of certainty of protection.

The most common method of balancing is the "sliding scale" approach,<sup>395</sup> which entails an evaluation of the amount and quality of the lawyer's mental processes included in the disputed material. The more apparent the mental processes contained in the materials, the greater the burden courts impose on the moving party to show need and hardship to obtain discovery.<sup>396</sup> This approach converts the two-tier ordinary-opinion work product standard into a sliding scale. The resulting uncertainty of protection raises several problems: the presence of mental processes is determined subjectively; it promotes "sharp practices"<sup>397</sup> by discouraging written records; and the outcome of balancing can be affected by simply adding more "mental processes" to the documents.<sup>398</sup>

A sliding scale standard not only destroys certainty of outcome, but also injects additional factors into discovery determinations that are inappropriate and possibly improper. The most prevalent additional factor is the exorbitant expense and time that may be involved in discovery.<sup>399</sup> The courts restricting discovery on the basis of this factor

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<sup>394</sup> As one commentator noted when discussing the balancing approach as applied to ordinary work product, this individualized balancing may also affect the burden of proof for work product discovery: "Whereas the special showing requirement seems to place the entire burden upon the one seeking discovery, the balancing approach would appear to place part of the burden upon the party resisting discovery to substantiate his reasons for resistance." Note, *Discovery of Attorney's*, *supra* note 250, at 290.

<sup>395</sup> See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971); *United States v. Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959).

<sup>396</sup> *United States v. Swift & Co.*, 24 F.R.D. 280 (N.D. Ill. 1959) (creating sliding scale approach).

<sup>397</sup> See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

<sup>398</sup> Although according an equal degree of protection to materials containing varying amounts of opinion work product may be a valid concern, it can be best accommodated elsewhere in the conceptual framework of work product. For example, an increased quantity of opinion work product probably reflects the lawyer's trial strategy and legal theories more than his evaluation of witness statements. Thus, a correct application of the rule 26(b)(3) substantial need criterion would protect the trial strategy more than witness statements. See *supra* notes 250-52 and accompanying text.

<sup>399</sup> See *Walker v. UPS*, 87 F.R.D. 360 (E.D. Pa. 1980) (emphasizing need for speedy and inexpensive determination of every action); *Chason v. Research-Cottrell, Inc.*, 29 Fed. R. Serv. 2d (Callaghan) 1459 (S.D. Ala. 1980).

find support in *Herbert v. Lando*,<sup>400</sup> a recent Supreme Court decision that, as discussed earlier, urges courts to limit discovery that will unduly delay trial and increase the other party's expense. The balancing test decisions assume that all expensive or time-consuming discovery results from discovery abuse.<sup>401</sup>

Although the goal of reducing discovery abuse is commendable, the method used to achieve it is not. If discovery abuse exists, a court should take steps to combat it; if it does not exist, a court should not saddle the discovering litigant with an inapplicable assumption. The work product rule is not a weapon to deal with discovery abuses, nor does the prevalence of abuse justify arbitrary action by judges against innocent litigants. A more effective means of combating truly exorbitant costs and deterring discovery abuse would be to split between the parties the discoveree's cost of complying with a court order to produce documents.<sup>402</sup> This device has substantial advantages: although leaving the applicable standard for production unaltered, it could reduce the disparity between parties with radically different resources and increase the cost to the discovery abuser.

The balancing approach—of questionable authoritative origin and subject to misguided application—cannot be redeemed by reference to the policy concerns of *Hickman*. A balancing approach does not adequately address the concerns central to *Hickman*. The courts' failure to develop clear factors to guide the application of a sliding scale reduces an attorney's certainty that a particular item will be protected. This high level of uncertainty impairs effective advocacy by deterring the preparation of written records and demoralizing the legal profession.<sup>403</sup> Furthermore, a balancing test incorrectly assumes that different factual settings call for different weights on both sides of the balance. The protection of the adversary system is a constant to be measured against, not a factor whose importance varies according to the caprice of judges.

c. *Strict Protection Standard.* A strict protection standard requires a greater showing for discovery of opinion work product than ordinary work product,<sup>404</sup> yet does not absolutely bar discovery of opinion materials. The standard allows exceptions for discovery of materials relating

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<sup>400</sup> 441 U.S. 153 (1979).

<sup>401</sup> See *supra* notes 307-12 and accompanying text.

<sup>402</sup> See, e.g., *Fauteck v. Montgomery Ward & Co.*, 91 F.R.D. 393, 398-99 (N.D. Ill. 1980) (holding that work product doctrine did not protect computer readable personnel records, but requiring plaintiffs to share defendant's costs in producing that information).

<sup>403</sup> See Note, *Protection*, *supra* note 197, at 344-45.

<sup>404</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (applying strict standard but not mandating it in lieu of absolute standard); *In re Sealed Case*, 676 F.2d 793, 810 (D.C. Cir. 1982) ("[A] party seeking discovery [of opinion work product] must show extraordinary justification."); *In re Grand Jury Investigation (Sun)*, 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *In re Natta*, 410 F.2d 187 (3d Cir.), *cert. denied*, 396 U.S.

to future crime or fraud and for cases in which the attorney's mental processes are "at issue."<sup>405</sup> In all other instances, a strict protection standard requires an extraordinary showing of necessity and hardship to obtain discovery.<sup>406</sup>

Although *Hickman v. Taylor* and rule 26(b)(3) do not clearly mandate absolute protection,<sup>407</sup> they do unequivocally require a stronger showing of need and hardship for disclosure of opinion work product. Courts, in interpreting *Hickman* and the rule, have used a variety of approaches, including the absolute, balancing, and strict standards of protection. The most recent decisions, however, favor a strict standard. For instance, the special master appointed by the district court in *In re Murphy*<sup>408</sup> rejected the absolute protection standard employed by the Fourth Circuit in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*.<sup>409</sup> The district court<sup>410</sup> and the Eighth Circuit<sup>411</sup> agreed. The Eighth Circuit considered the policies of *Hickman* and concluded that situations could arise in which "weighty considerations of public policy"<sup>412</sup> would dictate discovery of opinion work product. The *Murphy* court recognized two such situations: one where the contents of the disputed materials relate to an ongoing crime or fraud<sup>413</sup> and another where extraordinary need and hardship are shown.<sup>414</sup>

The most recent Supreme Court decision on opinion work product, *Upjohn Co. v. United States*,<sup>415</sup> indicates that, at minimum, a strict standard should be applied to discovery of opinion work product.<sup>416</sup> Although the Court declined to set an express standard for discovery, it required a "far stronger showing of necessity and unavailability by other means than was made by the Government."<sup>417</sup> As in *Hickman*, the Court, rather than propounding an absolute standard, emphasized the

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836 (1969); Shapiro, *supra* note 159; Comment, *The Potential for Discovery of Opinion Work Product under Rule 26(b)(3)*, 64 IOWA L. REV. 103 (1978); Note, *Protection*, *supra* note 197.

<sup>405</sup> See *infra* notes 424-66 and accompanying text.

<sup>406</sup> See, e.g., *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982) ("[T]o the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification.").

<sup>407</sup> See *supra* notes 376-82 and accompanying text.

<sup>408</sup> 560 F.2d 326, 332 (8th Cir. 1977).

<sup>409</sup> 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

<sup>410</sup> 560 F.2d at 332.

<sup>411</sup> *Id.* at 339.

<sup>412</sup> *Id.* at 336.

<sup>413</sup> *Id.* at 337-38.

<sup>414</sup> *Id.* at 336.

<sup>415</sup> 449 U.S. 383 (1981).

<sup>416</sup> "As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Id.* at 401.

<sup>417</sup> *Id.* at 402.

high showing necessary to warrant discovery of opinion work product.<sup>418</sup> Moreover, the Court did not mention a balancing approach, or refer to individual circumstances in its discussion of the necessary showing. Thus, although the Court refused to endorse one standard clearly, it used a strict protection standard, and the lower courts must take their guidance from that apparent holding.

In sum, *Upjohn*, like *Hickman*, indicated no intent to impose an absolute standard. By stating no preference, the Court left the lower courts to battle over the standard, as they have done for the last thirty-six years. The Advisory Committee's ambiguous remarks in the notes accompanying rule 26(b)(3) reflect this tradition of confusion, but evince no clear intent to institute an absolute standard.<sup>419</sup> The trend in the cases and commentary is toward a strict standard, and the *Upjohn* decision makes sense only if interpreted as a call to the lower courts to suggest clear formulations and arguments for such a standard.

Of the three standards for opinion work product protection, the strict protection standard best implements the policies of *Hickman*. The policies underlying strict protection of opinion work product are readily apparent. A stricter showing for discovery is necessary because opinion work product is most important to the adversary system.<sup>420</sup> Because the level of showing required represents the interest of the adversary system,<sup>421</sup> this increased showing reflects the higher need for privacy of opinion work product, or a lower need for discovery, or both.<sup>422</sup> More liberal discovery of opinion work product would affect attorneys' behavior negatively, channeling it in a way contrary to the goals of discovery and disrupting the adversary system.<sup>423</sup>

Moreover, the strict protection standard is not subject to the infirmities of the other standards. The absolute standard provides protection for opinion work product beyond that required to encourage effective advocacy. In contrast, a strict standard is flexible enough to allow discovery in extraordinary circumstances, thereby facilitating, not impeding, the search for truth. At the same time, requiring a strict showing encourages attorney diligence and thorough preparation by

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<sup>418</sup> *Id.* at 401-02. "While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing . . . than was made . . . would be necessary to compel disclosure." *Id.*

<sup>419</sup> See *supra* notes 374-82 and accompanying text.

<sup>420</sup> See *supra* notes 347-53, 358-61 and accompanying text.

<sup>421</sup> See *supra* notes 163-75 and accompanying text.

<sup>422</sup> This argument rests upon two assumptions: that opinion work product bears more of the attorney's individual imprint and thus should be more private; and that opinions, as opposed to facts, are not necessary to opposing counsel's case. Courts seem to believe that opinion work product discovery will damage the discoveree more than it will help the discoveror. See, e.g., *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968) (mental impressions of agents are not essential for adequate preparation of discoveror's case).

<sup>423</sup> See *supra* notes 347-53, 358-61 and accompanying text.



protecting counsel's privacy. A strict standard does not encourage abuse as does an absolute standard; a moderate disparity between the standard for discovery of opinion and ordinary work product does not give attorneys as much incentive to infuse their factual notes with opinion material or to avoid objectifying their work.

The strict protection standard avoids the problems inherent in a balancing approach as well. The standard is clear enough to permit reasonable certainty of protection and principled application. It provides protection predictable enough to prevent "sharp practices," yet flexible enough to meet those "rare situations" where public policy and the need for truth mandate disclosure.

### 3. *Exceptions to Opinion Work Product Immunity*

Courts have recognized two major exceptions to rule 26(b)(3)'s work product immunity: the "at issue" exception and the crime-fraud exception. When an attorney's mental impressions, theories, or conclusions are "at issue" in a suit, courts have held that the documents containing these thoughts are discoverable.<sup>424</sup> In *Bird v. Penn Central Co.*,<sup>425</sup> for example, underwriters sued to rescind insurance policies, alleging that defendants made misrepresentations in their applications. The defendants asserted that laches barred the action because the underwriters knew of the grounds for rescission long before they brought suit. Because the advice of counsel concerning claim investigation was directly at issue, and the need for the information was compelling, the court ordered the underwriters to produce the relevant documents.<sup>426</sup>

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<sup>424</sup> See *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 725 (N.D. Ill. 1978) (defendants' reliance on advice of counsel as defense to stockholder's class action suit made such advice central issue, overcoming work product protection); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 933 (N.D. Cal. 1976) (plaintiff's claim that defendant instituted patent infringement suits in bad faith placed defendant's advice of counsel at issue, making it subject to discovery); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129, 136 (E.D. Pa. 1975) (court denied plaintiff's motion for protective order because files and records of attorney were at issue in action for indemnity); see also 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[4], at 26-447 ("[W]hen the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are 'work product.'"). Courts declaring that the advice and thoughts of counsel are at issue in a suit usually use the exception to avoid rule 26(b)(3)'s strict protection of opinion work product. See Note, *Protection*, *supra* note 197, at 341-42 ("[C]ourts recognize the at issue exception, permitting discovery of opinion work product when the mental impressions or activities of counsel are central to the opposing party's claim or defense.") (footnotes omitted); see also 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[4], at 26-447.

<sup>425</sup> 61 F.R.D. 43 (E.D. Pa. 1973).

<sup>426</sup> *Id.* at 46-47. The *Bird* court tailored the discovery to the issue of laches: Rule 26(b)(3) on its face protects against the discovery of these aspects of the work product. However, exceptions have been made where such information is directly at issue, and the need for its production is compelling, as here. . . . Therefore, to the extent that legal opinions and observations made by counsel

*Bird* indicates that the "at issue" exception arises when parties assert a claim or defense based on the "advice of counsel."<sup>427</sup> The exception also applies when a party alleges that a suit was begun or settlement was made in bad faith. In *Handgards, Inc. v. Johnson & Johnson*,<sup>428</sup> for example, a manufacturer claimed that a competitor had instituted a series of patent infringement suits in bad faith as part of a conspiracy to restrain trade and monopolize the industry.<sup>429</sup> The plaintiff attempted to depose three lawyers primarily responsible for prosecuting the patent infringement suits for the defendant and subpoenaed documents reflecting the lawyers' opinions on the merits of that litigation.<sup>430</sup> The court held the documents discoverable because "the principal issue in the case . . . [was] the good faith of the defendants in instituting and maintaining the prior patent litigation against plaintiff."<sup>431</sup>

*Bird* and *Handgards* thus allow a party to discover the opinion work product of the other party if he can place the opposing attorney's actions at issue and show both compelling need and undue hardship.<sup>432</sup> However, not all courts accept the "at issue" exception. In *Duplan Corp.*

for plaintiffs suggest reasons to bring or not bring a suit for rescission of the insurance contract, they are to be produced.

*Id.* at 47 (citations omitted).

<sup>427</sup> See also *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 726 (N.D. Ill. 1978) (defendants in stockholders' class action asserted advice of counsel as defense).

<sup>428</sup> 413 F. Supp. 926 (N.D. Cal. 1976).

<sup>429</sup> *Id.* at 928.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 931. The court reasoned that

[p]laintiff's success in the instant action depends upon a showing that defendants pursued the prior suits knowing they would be unsuccessful on the merits. Since the lawyers who managed and supervised the former litigation for the defendants are being called as witnesses to express their opinions as to the merits of the prior suits and the validity of the underlying patents, plaintiff has a particularized and compelling need for the production of the relevant work product of these attorneys. Without discovery of the work product, plaintiff will be unable to ascertain the basis and facts upon which the opinions of these witnesses are based. This will undoubtedly impair plaintiff's ability for effective cross-examination on a crucial issue. . . . [Plaintiff] can demonstrate the bad faith of the defendants only through the discovery of information in the hands of the defendants and their attorneys.

*Id.* The court noted that "the concern for a lawyer's privacy must give way when the advice of counsel is directly at issue." *Id.* at 932; see also *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129 (E.D. Pa. 1975) (materials needed to prove prior litigation brought in bad faith held discoverable).

<sup>432</sup> All the "at issue" cases stress that the party must still satisfy the substantial need and undue hardship tests of rule 26(b)(3). See, e.g., *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931 (N.D. Cal. 1976); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129, 133-36 (E.D. Pa. 1975). These additional requirements distinguish the "at issue" exception from the crime-fraud exception which does not require a showing of substantial need and undue hardship to discover work product. See *infra* note 452. Indeed, the "at issue" exception may not be a true exception because the rule 26(b)(3) tests still apply. It is, however, an exception in that it refutes the idea that rule 26(b)(3) absolutely protects opinion work product. See, e.g., *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 932-33 (N.D. Cal. 1976) ("at issue" exception used to rebut claim that rule 26(b)(3) absolutely pro-

*v. Moulinage et Retorderie de Chavanoz*,<sup>433</sup> the Fourth Circuit declined to invoke the "at issue" exception because it "fails to comport with the policies underlying *Hickman v. Taylor* and Rule 26(b)(3)."<sup>434</sup>

The present conflict over the "at issue" exception arose because *Hickman* did not clearly define the "scope of the special protection afforded opinion work product."<sup>435</sup> Cases decided after *Hickman* and before the adoption of rule 26(b)(3) reflected this conflict.<sup>436</sup> Commentators also disagreed over the applicability of an "at issue" exception.<sup>437</sup> The sides, however, have become more clearly drawn; courts and commentators that oppose the "at issue" exception also demand absolute protection for opinion work product,<sup>438</sup> while those that favor the exception call for a strict protection standard.<sup>439</sup>

The second major exception to rule 26(b)(3) opinion work product protection is the crime-fraud exception, which provides that when a client or his attorney is involved in a crime or fraud, the wrongdoer may not use work product immunity to avoid discovery.<sup>440</sup> Every circuit court considering the issue has held or assumed that the crime-fraud exception applies to work product immunity.<sup>441</sup> Many courts assume

protects opinion work product). For a discussion of the substantial need and undue hardship tests of rule 26(b)(3), see *supra* notes 241-52 and accompanying text.

<sup>433</sup> 509 F.2d 730 (4th Cir.), *cert. denied*, 420 U.S. 997 (1974).

<sup>434</sup> *Id.* at 734; see also *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 133 (S.D. Ga. 1982) (dictum) (granting plaintiff's motion for discovery of insurance investigators' mental impressions to prove claim of bad faith would "create a uniform test to determine work-product immunity whether the work-product contained the author's mental impressions or merely a compendium of his factual findings" and arguing that "this uniformity would be inconsistent with the holding in *Hickman* and the plain language of Rule 26(b)(3)").

<sup>435</sup> See Comment, *supra* note 404, at 112.

<sup>436</sup> Compare, e.g., *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979, 982 (E.D. Wis. 1969) (holding that discovery of an attorney's prior patent opinion at issue in the case may be discovered if required showing of necessity and undue hardship made) and *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968) (same) with *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 86 (E.D. Pa. 1969) (indicating that opinion work product is absolutely protected) and *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 537, 541-43 (D. Del. 1954) (same).

<sup>437</sup> Compare 4 J. MOORE & A. J. LUCAS, *supra* note 2, ¶ 26.64[4], at 26-447 (arguing for "at issue" exception) with 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2023, at 193 (contending that rule 26(b)(3) "gives absolute protection to an attorney's mental impressions, legal theories, and the like").

<sup>438</sup> See cases cited *supra* notes 434, 436; commentators cited *supra* note 437; see also Comment, *supra* note 404, at 112 (characterizing dispute over "at issue" exception as conflict over absolute protection for opinion work product).

<sup>439</sup> See *supra* note 432 and accompanying text.

<sup>440</sup> See, e.g., *In re Sealed Case*, 676 F.2d 793, 811-16 (D.C. Cir. 1982) (fraud by corporation's in-house counsel); *In re Doe*, 662 F.2d 1073, 1078-79 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (attorney allegedly advised client to bribe grand jury witnesses); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62-63 (7th Cir. 1980) (client fraud). In *In re Doe*, the court defined "fraud" as "a fraud on the judicial processes . . . which could be something less than criminal activity, but certainly encompasses criminal activity subverting or attempting to subvert the judicial process." 662 F.2d at 1079 n.4.

<sup>441</sup> *In re Sealed Case*, 676 F.2d 793, 811 n.67 (D.C. Cir. 1982); see, e.g., *In re John Doe*

that a client's present or future crime or fraud dispels work product protection.<sup>442</sup> In *In re Murphy*,<sup>443</sup> for example, the government contended that several pharmaceutical companies, knowing that a patent for tetracycline was unenforceable, defrauded the Patent Office by settling prior patent infringement suits to retain their monopoly control over the drug.<sup>444</sup> The government sought documents relating to the filing and settlement of the various suits, arguing that discovery immunity should not extend to opinion work product prepared in commission of a crime or fraud.<sup>445</sup> The *Murphy* court established two requirements for the crime-fraud exception. First, the party seeking to invoke the exception must make a *prima facie* showing that the client "was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme,"<sup>446</sup> and second, the court required a showing that the attorney's documents bear a "close relationship" to the client's present or future plan to commit a crime or fraud.<sup>447</sup>

The *Murphy* reasoning appears sound but fails to acknowledge that

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Corp., 675 F.2d 482, 492 (2d Cir. 1982); *In re Doe*, 662 F.2d 1073, 1078-79 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *In re Special Sept. 1978 Grand Jury (II)*, 604 F.2d 49, 62-63 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802-03 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326, 336 n.19, 336-37 (8th Cir. 1977).

<sup>442</sup> *In re Sealed Case*, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982).

<sup>443</sup> 560 F.2d 326 (8th Cir. 1977).

<sup>444</sup> *Id.* at 330.

<sup>445</sup> *Id.* at 337.

<sup>446</sup> *Id.* at 338.

<sup>447</sup> *Id.* at 338. In *Murphy*, however, the court concluded that if there was a crime-fraud exception, the government had failed to meet both requirements and denied discovery. *Id.*

Courts do not require proof beyond a reasonable doubt that someone has committed a crime or fraud. This is why many courts undertake a simplified two-step inquiry in determining the applicability of the crime-fraud exception. *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), for example, outlined this two-part analysis:

First, there must be a *prima facie* showing of a violation sufficiently serious to defeat the work product privilege. Second, the court must find some valid relationship between the work product under subpoena and the *prima facie* violation.

The first condition may be met by a showing that the client was engaged in planning a criminal or fraudulent scheme when it sought the advice of counsel, or that the client actually committed or attempted a crime or fraud subsequent to receiving the benefit of counsel's work product. The *prima facie* violation may also be the attorney's, since attorney misconduct negates the premise that the adversary system furthers the cause of justice.

. . . A finding that the work product reasonably relates to the subject matter of the possible violation should suffice [to meet the second stage of the inquiry.]

*Id.* at 814-15 (footnotes omitted). The two-part test is simple enough for courts to administer swiftly and efficiently. It also ensures that parties will not abuse the crime-fraud exception in seeking discovery of work product. In *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980), the court balanced the policy favoring insulation of attorney work product for the benefit of the attorney with the policy favoring disclosure where a client has used his attorney to engage in fraud. *Id.* at 63. The court concluded that written information and recorded verbatim oral information should be disclosed, while the attorney's opinion work product should be protected. *Id.*

a lawyer as well as a client is entitled to work product immunity.<sup>448</sup> For example, an attorney consulted unknowingly in furtherance of the client's crime or fraud may be able to claim the immunity.<sup>449</sup> Furthermore, because the crime-fraud exception only applies to present or future crimes or frauds, if the client completes the crime before retaining an attorney, the attorney could successfully invoke work product immunity.<sup>450</sup> However, only the innocent can successfully claim work product protection. Courts agree that a guilty client should not be able to assert the work product immunity of his innocent attorney.<sup>451</sup> Nor should an attorney be able to invoke the immunity to cover his own crime or fraud.<sup>452</sup>

Policies inherent in the adversary system and the *Hickman* decision support the "at issue" and crime-fraud exceptions. Both exceptions promote the goals of the adversary system<sup>453</sup>—eliciting truth and facilitating the proper administration of justice. Under both the crime-fraud

<sup>448</sup> See *Moody v. IRS*, 654 F.2d 795, 801 (D.C. Cir. 1981); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 n.4 (3d Cir. 1979); *infra* notes 449, 683-96, 709-16 and accompanying text.

<sup>449</sup> See, e.g., *In re Sealed Case*, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 802 n.5 (3d Cir. 1979); see *infra* notes 717-24 and accompanying text.

<sup>450</sup> See *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 803 (3d Cir. 1979).

<sup>451</sup> See *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980) ("When the case being prepared involves the client's ongoing fraud, . . . we see no reason to afford the client the benefit of [the work product] doctrine. It is only the 'rightful interests' of the client that the work product doctrine was designed to protect.") (citing *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)); see also *In re Sealed Case*, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982) ("[T]here is no need to accord a guilty client standing to assert the claims of its innocent attorney.").

<sup>452</sup> See, e.g., *In re Doe*, 662 F.2d 1073, 1078 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) ("No court construing [the work product doctrine] . . . has held that an attorney committing a crime could, by invoking the work product doctrine, insulate himself from criminal prosecution for abusing the system he is sworn to protect."); see *infra* notes 722-24 and accompanying text; cf. *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) ("[A]n attorney's opinion work product cannot be privileged if the work was performed in furtherance of a crime, fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system."). In *In re Sealed Case* the court criticized the *In re Doe* decision for suggesting that the government would have to show crime or fraud and meet rule 26(b)(3)'s substantial need and undue hardship requirements:

The exception for crime or fraud . . . stands apart from the basic qualification of the work product doctrine that a party may obtain work product on a showing of sufficient cause. When clients have used attorneys' efforts in furtherance of an ongoing crime or fraud, they are not entitled to protection from the courts. Once a sufficient showing of crime or fraud has been made, the privilege vanishes as to all material related to the ongoing violation.

*Id.* at 812 n.74. The crime-fraud exception is a "true" exception—one can discover work product under it without satisfying rule 26(b)(3)'s requirements of substantial need and undue hardship. Nevertheless, most cases involving the crime-fraud exception do meet these requirements. See, e.g., *In re Doe*, 662 F.2d 1073, 1080-82 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

<sup>453</sup> See Note, *Protection*, *supra* note 197, at 343 ("Both the at issue and crime or fraud exceptions further the ultimate goal of the judicial system of eliciting truth and justice.").

and "at issue" exceptions, the benefits of revealing the truth outweigh the need for work product protection. In crime-fraud cases, the discovering party needs opinion work product to prove the commission of a crime or fraud.<sup>454</sup> Because the information is usually unavailable from any other source, the crime-fraud exception is often necessary to prevent an attorney from using work product immunity to insulate himself from criminal prosecution. Similarly, to prove his claim or defense in "at issue" cases, the discovering party needs opinion work product that is usually unobtainable from other sources.<sup>455</sup> Denying such discovery could prevent the discovering party from obtaining relief on a potentially meritorious claim.<sup>456</sup> Thus, recognition of the crime-fraud and "at issue" exceptions promote the truth-seeking goal of the adversary system.

Moreover, these two exceptions satisfy the policies the Supreme Court set out in *Hickman v. Taylor*.<sup>457</sup> For example, allowing discovery under either exception would not inhibit a lawyer's independent trial preparation,<sup>458</sup> and would minimize other *Hickman* concerns such as fear that allowing discovery of a lawyer's mental impressions, conclusions, or opinions would deter the recording of such opinion work product.<sup>459</sup> Frequent discovery or unclear protection standards would necessarily deter written preparation of opinion work product;<sup>460</sup> the crime-fraud and "at issue" exceptions, however, minimize this concern because they are used infrequently and the standards for applying them are clear.<sup>461</sup>

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<sup>454</sup> See, e.g., *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (noting that work product itself may be part of a fraudulent scheme); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980); see *supra* notes 446-50 and accompanying text.

<sup>455</sup> See, e.g., *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931 (N.D. Cal. 1976); see *supra* notes 428-31 and accompanying text.

<sup>456</sup> *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. at 926, 931, 932 (N.D. Cal. 1976); see also Note, *Protection*, *supra* note 197, at 343.

<sup>457</sup> 329 U.S. 495 (1947); see Note, *Protection*, *supra* note 197, at 343; Comment, *supra* note 404, at 118 (arguing that "at issue" exception serves purposes of discovery by uncovering relevant facts and narrowing issues prior to trial); see also *supra* notes 163-75 and accompanying text (policies underlying *Hickman*).

<sup>458</sup> One commentator noted that

[t]o get discovery under either exception, a party first must show that he has exhausted his own independent efforts but has not been able to get the information elsewhere because it is peculiarly within the knowledge of his opponent. This prerequisite ensures that neither party will be lax in seeking the information.

Note, *Protection*, *supra* note 197, at 343. It is questionable whether the "exhaustion of independent efforts" test applies to the crime-fraud exception because most courts use a bifurcated analysis in determining the applicability of the exception. See *supra* note 447.

<sup>459</sup> 329 U.S. at 511. For a discussion of the secondary justifications for the work product doctrine, see notes 169-70 and accompanying text. The crime-fraud and "at issue" exceptions also may discourage "sharp practices." But cf. *supra* note 171 and accompanying text (suggesting that deterrence of these practices is not strong justification for work product doctrine).

<sup>460</sup> See, e.g., Note, *supra* note 170, at 814-15 (arguing that if attorneys cannot accurately predict outcome of discovery request, they will adjust their methods of preparation, frustrating the purposes of work product doctrine).

<sup>461</sup> See Note, *Protection*, *supra* note 197, at 343-44 ("Opinion work product would be dis-

For instance, before ordering discovery, courts using the "at issue" exception must find that opinion work product is essential to an asserted claim or defense,<sup>462</sup> and under the crime-fraud exception, courts may order discovery only if the discoveror makes a prima facie showing that the client or attorney has invoked work product immunity to perpetrate or conceal a crime or fraud.<sup>463</sup> Thus, courts applying either exception are unlikely to infringe upon protected work product.

The crime-fraud exception also preserves the integrity of the legal profession and the adversary system by deterring lawyers from assisting their clients in furtherance of crime or fraud.<sup>464</sup> Fear of disclosure could deter lawyers and clients from formulating criminal schemes that work product immunity could conceal.<sup>465</sup> One commentator suggests that rule 26(b)(3) be amended to implement the crime-fraud and "at issue" exceptions.<sup>466</sup> The case law, however, has clearly defined the exceptions and codification might simply encourage their wooden application. Thus, courts should continue to apply the exceptions on a case-by-case basis.

### E. Legal Theories

Legal theories upon which a party intends to rely are not protected as work product.<sup>467</sup> Traditionally, identification of legal theories has been an accepted procedure.<sup>468</sup> The 1970 amendments to the Federal Rules follow this tradition by allowing discovery of legal theories through interrogatories or requests for admissions.<sup>469</sup> The treatment of legal theories under the Rules reflects a careful balancing of the policies favoring free discovery and those supporting work product protection.

Discovery of legal theories serves the fundamental purposes of discovery: fact-maximization and issue formulation. Courts will not allow a request for all relevant information held by the opposing party; liti-

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coverable only if the lawyer's work is crucial to a claim or defense or if a client sought and received assistance from a lawyer while planning criminal activity.") (footnotes omitted).

<sup>462</sup> See *supra* notes 424-32, 455-56 and accompanying text.

<sup>463</sup> See *supra* notes 446-52 and accompanying text.

<sup>464</sup> See Note, *Protection*, *supra* note 197, at 344.

<sup>465</sup> See *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982).

<sup>466</sup> See Note, *Protection*, *supra* note 197, at 334.

<sup>467</sup> Professor Cooper contends that

[s]urprisingly few opinions attempt to reconcile discovery of [legal theories and contentions] with the work product doctrine, possibly because it is so clear that the doctrine is indeed inapplicable. . . .

This conclusion that the work product doctrine is inapposite to discovery of contentions mingling fact and law applies with equal force to discovery of legal theories as such.

Cooper, *supra* note 129, at 1286 (footnotes omitted).

<sup>468</sup> *Id.* at 1284-86.

<sup>469</sup> FED. R. CIV. P. 33(b), 36(a).

gants must tailor their requests to facts bearing on identified issues.<sup>470</sup> Relevant facts, therefore, might remain unavailable to a party ignorant of his opponent's legal theories: "[I]f he fails to consider an issue while thinking about the case in the abstract, he may never acquire the factual information which would suggest it."<sup>471</sup> In a sense, disclosure of legal theories is part of the pleading process, allowing the parties to focus on relevant factual investigation and issue development.

Some commentators argue that the benefits of encouraging clearly defined issues are outweighed by the danger that the issues will be frozen once defined.<sup>472</sup> One can avoid this problem, however, by denying binding effect to the issues developed in discovery, a course that the Advisory Committee<sup>473</sup> and the courts appear to follow.<sup>474</sup>

Furthermore, the purposes of discovery are served with little, if any, modification of the attorney's function. Legal theories, like facts, are discoverable only after opposing counsel has done the preliminary work the adversary system seeks to encourage—narrowing issues and recognizing the importance of particular facts. For example, an interrogatory that asks whether opposing counsel intends to rely on *res ipsa loquitur* demonstrates that the attorney has already explored the potentially relevant issues. The broader and less focused the request, the more likely that the adversary system will be harmed with little corresponding benefit to the policies underlying discovery. In such instances, courts may prevent discovery as unduly burdensome or oppressive.<sup>475</sup> Furthermore, because disclosure of a particular legal theory reveals little of the attorney's mental processes, this type of discovery does not undermine the incentive of counsel to pursue his case, nor does it undermine the morale of the legal profession generally.

Discovery of pure legal theory, however, is not the usual case. Most

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<sup>470</sup> Cooper, *supra* note 129, at 1284 & n.44.

<sup>471</sup> *Id.* at 1284.

<sup>472</sup> Professors James and Hazard note that [i]f interrogatories asking for legal contentions are propounded before the respondent has opportunity to conduct his own discovery, they give rise to the same difficulties as special pleading: The respondent risks being trapped if he commits himself before he knows all the available evidence and risks being drawn into a game of probe and parry if he tries to avoid committing himself.

F. JAMES & G. HAZARD, *supra* note 191, § 6.12, at 205.

<sup>473</sup> The Advisory Committee notes to the 1970 amendments to rule 33(b) state that under ordinary circumstances answers to interrogatories do not limit proof. Thus, the interrogating party cannot rely on the "unchanging character of the answers he receives." FED. R. CIV. P. 33(b) advisory committee note, 48 F.R.D. 487, 524 (1970); *see also* Cooper, *supra* note 129, at 1287 (proposing that courts avoid issue stagnation by denying binding effect to issues thus developed).

<sup>474</sup> Cooper, *supra* note 129, at 1287-89.

<sup>475</sup> Federal Rule of Civil Procedure 26(c) gives courts, upon motion by the person from whom discovery is sought and for good cause shown, the power to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."



cases involve requests for the facts supporting identified legal theories,<sup>476</sup> and the application of law to facts.<sup>477</sup> The line between these types of requests and protected opinion or ordinary work product<sup>478</sup> in intangible form is difficult to define. Discussion of requests for application of law to fact and a possible conflict between rule 26(b)(3) and rules 33 and 36 thus shades into a discussion of work product protection of intangible or unrecorded materials.

## F. "Intangibles" or Unrecorded Work Product: An Area of Confusion

### 1. Introduction

Intangible work product is essentially tangible work product in oral or unwritten form. It can be categorized along the same spectrum of potential subjects for discovery—facts, ordinary and opinion work product, and legal theories—as documents and other tangible things. The policies underlying work product immunity require that the standards of protection for intangibles be the same, or perhaps even higher, than those accorded to tangible materials.

Several policies support protection for opinion and ordinary work product in unwritten form. Intangibles necessarily reflect an attorney's mental impressions. For example, when an attorney is asked in an interrogatory to recount an interview with a witness, his perceptions, conclusions, and opinions drawn from that interview will inevitably color his response.<sup>479</sup> Thus, ordinary work product, when discovered through interrogatories, will contain more of a lawyer's mental processes than will discovery of tangible ordinary work product materials. As noted in *Hickman*, an attorney's recollection of an oral statement also presents "grave dangers of inaccuracy and untrustworthiness."<sup>480</sup> A related reason for protecting intangibles such as oral witness statements is that if they are not protected and are then used for impeachment, juries may attach undue significance to testimony inconsistent with the prior oral

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<sup>476</sup> Cooper, *supra* note 129, at 1287.

<sup>477</sup> These requests are authorized by Federal Rules of Civil Procedure 33(b) and 36(a) relating to interrogatories and requests for admission.

<sup>478</sup> See *supra* note 382 (discussing potential conflict between opinion work product protection under 26(b)(3) and discovery of opinion material under rules 33 and 36).

<sup>479</sup> See Shapiro, *supra* note 159, at 1079-80 ("Subjective evaluations of credibility—of sincerity, perception, and memory—are involved in determining the underlying correctness of [witness] statements."). Professor Shapiro forcefully argues for extending opinion work product protection "to any evaluation of witness credibility, whether or not embodied in a document."). *Id.* at 1071.

<sup>480</sup> *Hickman*, 329 U.S. at 512-13. The Third Circuit, in *Hickman v. Taylor*, 153 F.2d 212, 219-20 (1945), *aff'd on other grounds*, 329 U.S. 495 (1947), raised this same issue in holding that oral witness statements were "privileged." See *supra* notes 192-93 and accompanying text; see also *supra* notes 94-101 and accompanying text.

statement.<sup>481</sup> Moreover, failure to protect an unrecorded oral statement can force an attorney to be a witness rather than an advocate; he could have to testify "to defend his own credibility—perhaps against that of his chief witness, or possibly even his client."<sup>482</sup> Finally, as Justice Jackson stated in *Hickman*, "I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him."<sup>483</sup>

## 2. *Source of Protection*

The Federal Rules provide the mechanism for discovery of intangibles through interrogatories under rule 33 and requests for admissions under rule 36, but seemingly fail to provide protection for ordinary and opinion work product that is unwritten. Courts and commentators are uncertain whether rule 26(b)(3) protects intangibles or unrecorded work product. Many commentators contend that the rule shelters only those materials covered by its explicit terms: "documents and tangible

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<sup>481</sup> Justice Jackson noted that there would always be minor discrepancies between out-of-court and in-court statements. *Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring). Justice Jackson predicted that

[w]henver the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." . . . The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation . . .

*Id.*; see *supra* notes 119, 172-73 and accompanying text.

<sup>482</sup> 329 U.S. at 517 (Jackson, J., concurring). The *Hickman* Court noted that using the statements for impeachment or corroboration "would make the attorney much less an officer of the court and much more an ordinary witness." *Id.* at 513. Justice Jackson asserted that

[e]very lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.

*Id.* at 517; see *supra* notes 237-40 and accompanying text (discussing professional standards). But see Cooper, *supra* note 129, at 1277 (suggesting that fear that attorney would be forced to switch from role as advocate to role of witness is "fancied danger," easily remedied by allowing discovery subject to absolute bar against use of discovered material at trial); see also *supra* notes 172-73 and accompanying text (arguing that witness-advocate problem is too limited to be basis for work product immunity). For a general discussion of the use of statements to impeach a witness, see notes 293-96 and accompanying text.

<sup>483</sup> 329 U.S. at 516 (Jackson, J., concurring).

things.”<sup>484</sup> Others note that *Hickman* was not so limited;<sup>485</sup> the *Hickman* Court not only refused to order production of the lawyer’s recollections of oral statements made by witnesses but it “also appeared to bestow a higher degree of immunity on witnesses’ oral statements than on their signed, written statements, whether those oral statements were reflected in a lawyer’s memorandum or not.”<sup>486</sup> In *Hickman*, the Court implicitly applied to intangibles standards similar to those accorded tangible work product under the Rules. The Court segregated unprotected facts from the content of a witness’s oral statement and would allow discovery of such statements only in unidentified “rare situation[s].”<sup>487</sup> Because the 1970 amendment did not codify the *Hickman* treatment of intangible materials, the *Hickman* decision continues to govern the standards for unrecorded work product protection.<sup>488</sup>

### 3. Scope of Protection

The courts have had difficulty applying the *Hickman* decision to intangibles, but have tried valiantly to compel disclosure of “facts” while protecting oral statements.<sup>489</sup> The courts and commentators have also

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<sup>484</sup> See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64, at 26-451 (“Rule 26(b)(3) has no application in cases in which the party seeks to discover information other than the contents of documents and other tangible things.”); Shapiro, *supra* note 159, at 1065 (“Rule 26(b)(3) . . . is addressed *only* to ‘documents and tangible things.’”) (emphasis in original); Comment, *supra* note 196, at 1163 (“the provisions of rule 26(b)(3) are specifically limited to *tangible* trial preparation materials” and it therefore has no application “when discovery of work-product is sought through interrogatories or depositions”) (emphasis in original). Professors Wright and Miller also emphasize the limitation of rule 26(b)(3) to documents and things, and the discoverability, under *Hickman* and rule 26(b)(3), of facts and information. See 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2023, at 194; *cf. id.* § 2026, at 229-32 (mental impressions and legal theories). See generally *id.* §§ 2023-24, at 190-210. However, they also assert that if a document is protected from discovery, an interrogatory calling “for such complete information about the document as to be equivalent to furnishing the document itself” would be improper. *Id.* § 2166, at 496.

<sup>485</sup> Professor Moore, for example, notes that the *Hickman* rationale applied “with special force to discovery of the mental impressions of the attorney, as illustrated by the recollections of oral interviews with witnesses sought by the plaintiff in that case.” 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[1], at 26-414. Because rule 26(b)(3) by its terms deals only with documents and tangible things, “it leaves the ‘work-product’ doctrine unchanged in this regard.” *Id.*; see also 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[4], at 26-451 (arguing that because rule 26(b)(3) only applies to documents and tangible things, it does not apply when work product is sought through interrogatories and therefore one must revert to principles of *Hickman*); Comment, *supra* note 196, at 1163 (“[F]or unrecorded work-product, the hazy guidelines of *Hickman* are still the only applicable law.”); *supra*, notes 7-10 and accompanying text.

<sup>486</sup> Shapiro, *supra* notes 159, at 1066; see *Hickman*, 329 U.S. at 512-13.

<sup>487</sup> *Hickman v. Taylor*, 329 U.S. 495, 513 (1947); see *supra* note 116 and accompanying text.

<sup>488</sup> See *supra* note 485.

<sup>489</sup> Compare, e.g., *Hazell v. Pennsylvania R.R.*, 15 F.R.D. 282, 284 (E.D. Pa. 1953) (compelling disclosure of “facts” after distinguishing them from “statements”) and *Gaynor v. Atlantic Greyhound Corp.*, 8 F.R.D. 302, 303 (E.D. Pa. 1948) (same) with *Uinta Oil Ref. Co. v. Continental Oil Co.*, 226 F. Supp. 495, 501 (D. Utah 1964) (denying discovery of oral state-

struggled to reconcile decisions that grant protection to unwritten work product with the text of rule 26(b)(3). In *In re Anthracite Coal Antitrust Litigation*,<sup>490</sup> for example, the plaintiff's interrogatories sought details of discussions between an officer and employees of one corporate defendant and outside counsel for another defendant.<sup>491</sup> The court indicated that rule 26(b)(3) "is not by its terms applicable to all communications between an attorney preparing for trial and a non-client but only to documents and other tangible things which would normally be written or recorded statements of the non-clients."<sup>492</sup> Nevertheless, the court treated oral communications and written statements as identical for purposes of determining the applicability of the work product doctrine.<sup>493</sup> Thus, the court reached the correct result, equal treatment of the oral and written work product, but failed to ground its decision in the applicable authority—*Hickman v. Taylor*. Other decisions dealing with the tangibility distinction are similarly inconclusive.<sup>494</sup>

In an effort to remedy this confusion a few courts have grouped all intangible materials with opinion work product, requiring an extraordinary showing of need to overcome work product protection in both areas.<sup>495</sup> This grouping may be appropriate because intangibles are often

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ments after distinguishing them from presently available "facts") and *Siegel v. Yates*, 11 F.R.D. 129, 131 (S.D.N.Y. 1951) (same). See also *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572, 579 (S.D.N.Y. 1960) (fact that oral communications are involved does not preclude application of work product immunity). Professor Shapiro noted that this distinction between unprotected facts and the content of oral statements was "tenuous and unworkable." Shapiro, *supra* note 159, at 1067.

<sup>490</sup> 81 F.R.D. 516 (M.D. Pa. 1979).

<sup>491</sup> *Id.* at 519.

<sup>492</sup> *Id.* at 521.

<sup>493</sup> *Id.* at 522. The court reasoned that allowing discovery of the oral communications merely upon a showing of relevancy would ignore the fact that the information was collected in anticipation of litigation. *Id.* at 521-22. The court also noted, however, that if the oral communications were treated as absolutely privileged, it "would encourage attorneys not to make written records of any interviews with non-clients in order to avoid the possibility that such memoranda would be subject to disclosure." *Id.* at 522.

The court, however, could not determine whether rule 26(b)(3) applied because it lacked necessary factual information. *Id.* at 522-23. For example, the parties failed to advise the court of the "precise nature of the statements sought to be discovered and the [alleged] contents thereof" so that the court could consider the relevancy of the material. *Id.* at 522.

<sup>494</sup> Shapiro, *supra* note 159, at 1069; see, e.g., *Arco Pipeline Co. v. S/S Trade Star*, 81 F.R.D. 416, 417-18 (E.D. Pa. 1978) (court allowed discovery of identity of experts retained but not expected to testify at trial, but not of facts known or opinions held by such experts); *United States v. IBM*, 79 F.R.D. 378, 379-80 (S.D.N.Y. 1978) (witness could be deposed regarding recollection of interview between himself and opposing counsel because such material was not work product).

<sup>495</sup> See, e.g., *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980) ("Work product consists of the tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions."). But cf. *In re Kaleidoscope Inc.*, 15 Bankr. 232, 240-41 (Bankr. N.D. Ga. 1981) (noting that "[i]n some instances . . . the services performed by an attorney for his client will be entirely intangible, in that the lawyer

oral opinion work product. As an alternative, one commentator suggests resolving the problem of "intangibles" or unrecorded work product by adding the words "or intangible" after the word "tangible" in rule 26(b)(3).<sup>496</sup>

### III

#### TEMPORAL FACTORS

##### A. Anticipation of Litigation

Timing problems permeate the work product doctrine. The Federal Rules of Civil Procedure define work product in terms of timing: to qualify for work product protection, material must be prepared in anticipation of litigation.<sup>497</sup> Determining whether materials fit within this definition can be problematic, especially when a party creates the work product in the ordinary course of business. Courts also have had difficulty deciding whether work product immunity applies to materials prepared for both present and prior litigation or for present litigation only. Finally, a few courts have questioned whether a nonparty to a present action may receive protection for material prepared for other litigation or for litigation that has not yet arisen. This section addresses these three timing problems: the anticipation of litigation problem (with a special emphasis on the ordinary course of business exception), the prior litigation problem, and the nonparty work product problem.

Rule 26(b)(3)<sup>498</sup> protects material "prepared in anticipation of litigation or trial."<sup>499</sup> On the theory that unlimited discovery of trial preparation material undermines the adversary system,<sup>500</sup> by offering presumptive protection to these materials, the rule encourages parties and their agents to prepare fully for litigation without fear of unwarranted discovery.<sup>501</sup> Conversely, the rule does not protect "work prod-

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will merely apply his experience, intellectual capacity, and knowledge of the law to the solution of the client's problem," but implying that "intangibles" are not work product).

<sup>496</sup> See Comment, *supra* note 196, at 1163 ("Such a minor revision would specifically apply the principles of work-product discovery to the entire corpus of work-product."). But see *supra* text following note 247 (arguing that case-by-case interpretation of rule 26(b)(3) will make rule more consistent with other discovery rules).

<sup>497</sup> FED. R. CIV. P. 26(b)(3).

<sup>498</sup> Although this discussion of the anticipation-of-litigation aspect of the work product doctrine focuses on Federal Rule of Civil Procedure 26(b)(3), it also applies to other manifestations of the work product doctrine, which exist independently of the rule. For example, in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154-55 (1975), the Supreme Court acknowledged that "work product" may be protected from requests under the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1982). The Court in *Sears* noted that "[w]hatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation . . . ." *Id.* at 154.

<sup>499</sup> FED. R. CIV. P. 26(b)(3).

<sup>500</sup> See *supra* notes 169-70 and accompanying text.

<sup>501</sup> See *supra* notes 163-74 and accompanying text; see also *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974) (if discovery were permitted in

uct" that is not prepared in anticipation of litigation because fear of discovery of such work does not impair the adversary system.<sup>502</sup>

Given this rationale for the anticipation-of-litigation requirement, one would logically assume that the "test" for determining whether a lawyer or representative prepared material in anticipation of litigation would be a strictly factual one. Although some courts and commentators have treated the requirement in this way, others have based their determination at least partly on policy considerations.<sup>503</sup>

### 1. *Purely Factual Standards*

Rule 26(b)(3) requires judges to make a two-step inquiry before deciding whether to accord materials work product protection. First, the rule requires that courts determine whether the material in question qualifies as work product because it was prepared in anticipation of litigation.<sup>504</sup> Second, the rule directs judges to allow discovery of material prepared in anticipation of litigation only after the party seeking discovery shows "substantial need" for the material in the preparation of his case and inability to obtain the substantial equivalent without undue hardship.<sup>505</sup> The first step—application of the anticipation-of-litigation test—usually involves a factual examination, with the party invoking the work product doctrine to block discovery having the burden of showing that the material sought was prepared in anticipation of litigation.<sup>506</sup> In meeting this burden, a party is aided by the fact that the

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unanticipated subsequent litigation, "our adversary system would clearly suffer"), *cert. denied*, 420 U.S. 997 (1975); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 482-83 (4th Cir. 1973); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 143 (D. Del. 1982); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151 (D. Del. 1977); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974) ("[I]t is likely that the party's attorney would have been discouraged from recording his impressions had he known that they would be discoverable."), *aff'd*, 534 F.2d 330 (7th Cir. 1976); *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972); Note, *supra* note 170, at 808-10 ("[T]he *Hickman* Court suggested that if attorneys know that their work product is subject to discovery, they will behave in a manner necessarily harmful to the adversary system.").

The anticipation-of-litigation test roughly approximates asking whether a lawyer or agent's trial preparation would have been affected by fear of discovery. Because it is difficult to delve into the minds of a client's representatives, courts must fall back on the more objective anticipation-of-litigation test. See *SEC v. National Student Mktg. Corp.*, 18 Fed. R. Serv. 2d (Callaghan) 1302, 1310-11 (D.D.C. 1974) (discussing difficulty of looking into minds of those preparing documents).

<sup>502</sup> See *Developments, supra* note 2, at 1030 ("Since a lawyer who does not envision litigation will not anticipate discovery requests, the fear of disclosure should not affect the way in which the material is prepared.").

<sup>503</sup> See *infra* notes 647-69 and accompanying text.

<sup>504</sup> FED. R. Civ. P. 26(b)(3).

<sup>505</sup> *Id.*

<sup>506</sup> See *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980) (Department of Energy cannot successfully claim work product privilege for its documents where it "failed to establish that the documents withheld" were prepared in anticipation of litigation); *United*

anticipation of litigation standard is broader than a strict reading of that language might imply.

Materials need not be gathered exclusively for trial preparation purposes to warrant work product protection.<sup>507</sup> Documents prepared before litigation begins, or even for litigation that never arises, may be protected from discovery under rule 26(b)(3).<sup>508</sup> The scope of the standard, however, is limited. Every time a lawyer does work, litigation may be in the back of his mind. For instance, a lawyer writing down thoughts for a company on patent applicability may include some advice on future conduct to avoid litigation. Courts refuse, however, to grant protection to materials produced through actions such as these, deeming them to be too far removed from litigation.<sup>509</sup>

In an unsuccessful attempt to clarify the standard, courts have devised a variety of reformulations of the phrase "in anticipation of litigation."<sup>510</sup> For example, some courts say the material may qualify for protection if prepared because of some "prospect" of litigation<sup>511</sup> or a "contingency" of litigation<sup>512</sup> or "an eye toward" litigation.<sup>513</sup> A more helpful reformulation of the standard focuses on whether any specific *claims* had arisen before preparation of the material in question.<sup>514</sup> Al-

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States v. AT&T, 86 F.R.D. 603, 627 (D.D.C. 1979) (pretrial order setting out guidelines for resolution of privilege claims by special masters specifies that party who prepared documents that are subject of discovery request must establish that they were prepared in anticipation of litigation).

<sup>507</sup> See *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 50-51 (S.D.N.Y. 1979) (document prepared "at the request of and for the use of the government's attorneys" in a separate civil investigation *and* in anticipation of litigation protected by work product doctrine). The court in *GAF Corp.*, however, noted that "documents . . . prepared *solely* for purposes other than trial preparation are not protected." *Id.* at 50 (emphasis added).

<sup>508</sup> See, e.g., *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 847 (8th Cir. 1973); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 6 (N.D. Ill. 1980) (documents can qualify as being in anticipation of litigation even if prepared several *years* in advance); *United States v. Bonnell*, 483 F. Supp. 1070, 1078 (D. Minn. 1979).

<sup>509</sup> See *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D. Conn. 1976) (court found that legal opinions on patent applicability were not prepared in anticipation of litigation, stating that "no decision has stretched the concept to the extent requested here").

<sup>510</sup> Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 IOWA L. REV. 1277 (1981).

<sup>511</sup> See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 624 (8th Cir. 1977); *United States v. Exxon Corp.*, 87 F.R.D. 624, 638 (D.D.C. 1980); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1033 (N.D. Ga. 1974); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974); see also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024.

<sup>512</sup> See, e.g., *United States v. Bonnell*, 483 F. Supp. 1070, 1078 (D. Minn. 1979); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1033 (N.D. Ga. 1974); *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972); *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969).

<sup>513</sup> See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019, 1026 (S.D.N.Y. 1980); *United States v. Bonnell*, 483 F. Supp. 1070, 1078 (D. Minn. 1979); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974).

<sup>514</sup> See, e.g., *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865-66

though courts using this approach do not define *claims*, they apparently mean that the documents must be prepared in response to a specific fact situation that probably will lead to litigation. For example, one court found that a specific claim had arisen when a magazine received a lengthy letter from a party listing "discrepancies" in an article about that party published four months earlier.<sup>515</sup> The court considered the magazine prudent for anticipating the defamation action and concluded that the material was prepared "in anticipation of litigation."<sup>516</sup> In contrast, another court refused work product status to manuals prepared by a United States attorney's office, which later became the subject of a Freedom of Information Act<sup>517</sup> request.<sup>518</sup> The court found that an adequate and specific fact situation leading to prospective litigation was not present when the government prepared the documents.<sup>519</sup>

Professors Wright and Miller have articulated an anticipation-of-litigation standard that encompasses the concerns of those courts using a "specific claim" test:

Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.<sup>520</sup>

In this frequently cited test,<sup>521</sup> Wright and Miller, like the "specific claim" courts, stress both the "factual situation"<sup>522</sup> leading to the preparation of the document and the nature of the document itself. For example, the Wright and Miller test directs a court to consider the

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(D.C. Cir. 1980); *Kent Corp. v. NLRB*, 530 F.2d 612, 623-24 (5th Cir. 1976); *United States v. AT&T*, 86 F.R.D. 603, 627 (D.D.C. 1979); *Herbert v. Lando*, 73 F.R.D. 387, 402 (S.D.N.Y.), *rev'd on other grounds*, 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979); *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974); *Stix Prods., Inc. v. United Merchants Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969).

<sup>515</sup> *Herbert v. Lando*, 73 F.R.D. 387, 400-03 (S.D.N.Y.), *rev'd on other grounds*, 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979). In *Herbert*, *Lando* wrote an article about Herbert, a Vietnam veteran, for *The Atlantic*. Herbert sent a letter complaining of discrepancies in the piece to the magazine through his agent.

<sup>516</sup> *Id.* at 402.

<sup>517</sup> 5 U.S.C. § 552 (1982).

<sup>518</sup> *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 757 (D.C. Cir. 1978).

<sup>519</sup> *Id.* at 775-76. The court in *Jordan* stated that "[t]he public disclosure of these guidelines could have no conceivable effect on the actual conduct of an on-going or prospective trial."

<sup>520</sup> 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 198.

<sup>521</sup> See, e.g., *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 803 (3d Cir. 1979); *In re Grand Jury Investigation (Sun)*, 599 F.2d 1224, 1229 (3d Cir. 1979); *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977); *Status Time Corp. v. Sharp Elecs. Corp.*, 95 F.R.D. 27, 29 (S.D.N.Y. 1982); *Osterneck v. E.T. Barwick Indus. Inc.*, 82 F.R.D. 81, 87 (N.D. Ga. 1979); *United States v. Lipshy*, 492 F. Supp. 35, 45 (N.D. Tex. 1979); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 151 (D. Del. 1977).

<sup>522</sup> 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 198.



potential impact of the letter in the defamation case<sup>523</sup> (the factual situation) and to notice that the manuals in the United States attorney case<sup>524</sup> were not related to any particular case (the nature of the documents).

As the above examples illustrate, applying the Wright and Miller test or looking to see if a specific claim has arisen can amount to the same inquiry couched in different terms. Both tests attempt to limit protection to material prepared in sufficiently adverse situations, thus ensuring that the underlying work product policies are applicable.

Even though these seemingly different tests can yield the same result, as would a command to carefully review *all* facts in a discovery dispute, they can be helpful because they provide judges with a method or checklist to assist them in examining the facts. Rules of thumb such as these, if not mistaken for hard and fast commands,<sup>525</sup> can be useful to courts.

One commentator proposes several additional factors that courts might consider when applying the anticipation-of-litigation test.<sup>526</sup> In addition to examining the nature of a document and the facts leading to its preparation, and asking whether a specific claim had arisen, courts also can consider whether the document was prepared at the request of a lawyer<sup>527</sup> or in the ordinary course of business.<sup>528</sup>

Asking whether documents were prepared at a lawyer's request can be useful because a party considering litigation often will consult a lawyer first and act under that lawyer's direction in gathering information for the anticipated law suit.<sup>529</sup> Similarly, inquiring into whether docu-

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<sup>523</sup> See *supra* notes 515-16 and accompanying text.

<sup>524</sup> See *supra* notes 517-18 and accompanying text.

<sup>525</sup> See *infra* notes 533-58 and accompanying text (discussion of ordinary course of business exception).

<sup>526</sup> Note, *supra* note 510, at 1287-98.

<sup>527</sup> See, e.g., *United States v. O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (holding that documents not prepared at request of lawyer "are conclusively presumed to have been made in the ordinary course of business"); Note, *supra* note 510, at 1287 ("specific claim" test).

<sup>528</sup> See, e.g., *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 18 (D. Md. 1980); Fed. R. Civ. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970).

<sup>529</sup> *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (finding anticipation-of-litigation requirement not met unless attorney directed preparation of materials). For example, the court in *United States v. O'Neill*, 619 F.2d 222, 226-27 (3d Cir. 1980), noted that a police department could not use the work product doctrine to justify withholding certain documents from a commission because lawyers had not prepared the documents. The records, sought by the United States Civil Rights Commission in an investigation of the Philadelphia Police Department, included citizen complaints and records of the department's handling of the complaint. *Id.* at 224. The circuit court said it was "inappropriate" to call these documents work product. A close look at the nature of the documents might have yielded the same result as asking whether a lawyer had prompted preparation of the documents.

ments were produced in the ordinary course of business may ease a court's task in deciding whether material was prepared in anticipation of litigation.<sup>530</sup> If documents are routinely prepared for business purposes, they are less likely to have been prepared in contemplation of a specific lawsuit. Reliance on any particular factor as more than a guide for furthering factual inquiry, however, can undermine the work product doctrine.<sup>531</sup> Blindly relying on the ordinary course of business factor may cause an insurance company which prepared a document in the ordinary course of business *and* in anticipation of litigation to lose deserved work product protection.<sup>532</sup> Thus, the factors mentioned above should be used solely to guide a court's examination of the facts in its determination of whether the materials in question were prepared in anticipation of litigation.

## 2. *The Ordinary Course of Business "Exception"*

Relying, perhaps, on the Advisory Committee notes to rule 26(b)(3),<sup>533</sup> several courts regard the ordinary course of business factor described above as a discrete exception to work product protection.<sup>534</sup> The courts use this exception to limit the protection given to internal documents of large manufacturing and insurance companies and to documents prepared by nonlawyers. Although denial of work product status to these types of materials furthers the policies underlying open discovery, a criterion that works as a hard and fast exception to the protection of rule 26(b)(3) jeopardizes the goals of the work product doctrine.<sup>535</sup> Recently, a small number of courts and commentators have

<sup>530</sup> For example, a university's dormitory fire investigation report, if prepared in the ordinary course of business (to guard against reoccurrence of dorm fires), and not in anticipation of litigation, would not be work product. *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 649-50 (D.D.C. 1982); *see also* cases cited *supra* note 528.

<sup>531</sup> *See, e.g., APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 18 (D. Md. 1980) (refuting assertion that "all documents prepared by an insurance company in investigating a claim, are, by definition, compiled in the ordinary course of business and, thus, automatically subject to discovery").

<sup>532</sup> *See, e.g., Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89 (E.D. Mo. 1980) (granting protection to statements taken by defendant company's safety investigator that might not have been protected had court relied heavily on ordinary course of business factor).

<sup>533</sup> *See, e.g., Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 370-71 (N.D. Ill. 1972).

<sup>534</sup> *See, e.g., McDougall v. Dunn*, 468 F.2d 468, 473 (4th Cir. 1972); *Soeder v. General Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (ordinary course of business materials come under rule 26(b)(1), not rule 26(b)(3)); *Rakus v. Erie-Lackawanna R.R.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1032-33 (N.D. Ga. 1974); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 42 (D. Md. 1974); *Galambus v. Consolidated Freightways Corp.*, 64 F.R.D. 468, 472-73 (N.D. Ind. 1974); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972); *Universal Vendors, Inc. v. Candimat Co. of Am.*, 16 Fed. R. Serv. 2d (Callaghan) 1329, 1330 (E.D. Pa. 1972); *United States v. Maryland Shipbuilding & Drydock Co.*, 51 F.R.D. 159, 160 (D. Md. 1970).

<sup>535</sup> *See infra* notes 559-79 and accompanying text.

criticized use of the ordinary course of business characterization as more than a rule of thumb.<sup>536</sup>

The phrase "ordinary course of business" is not found in rule 26(b)(3). Rather, the Advisory Committee notes on the rule provide that, "materials assembled in the ordinary course of business . . . are not under the qualified immunity provided by this subdivision."<sup>537</sup> Despite meager support for the Advisory Committee's statements,<sup>538</sup> several courts have adopted an ordinary course of business exception as an implicit component of rule 26(b)(3).<sup>539</sup>

Many courts adopting an ordinary course of business exception fear that work product protection threatens the policies underlying open discovery by limiting discovery too severely.<sup>540</sup> For example, an insurance company routinely investigating an accident involving one of its claimants may uncover many of the same facts that it would uncover in an investigation in preparation for litigation.<sup>541</sup> Companies investigating accidents involving their products or employees may face the same problem.<sup>542</sup> Some courts fear that if they grant protection to such routinely prepared documents, large numbers of insurance company or in-

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<sup>536</sup> See *infra* notes 551-58 and accompanying text.

<sup>537</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970).

<sup>538</sup> The Advisory Committee cites *United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962), which did not involve a discovery dispute but rather a problem with the admissibility at trial of an accident report. The court in *New York Foreign Trade Zone Operators* noted that while this report was admissible under the Federal Business Records Act, 28 U.S.C. § 1732 (1958), it might not have been admissible if it had been prepared in anticipation of litigation because reports prepared with litigation in mind may be "untrustworth[y]" and "unreliab[le]." The court hinted that keepers of business records get an unfair advantage in the discovery context if litigation arises by receiving work product protection for documents they would have prepared without the prospect of litigation. 304 F.2d at 797. The Advisory Committee, by also citing *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963), may have been responding to this concern in its notes to rule 26(b)(3).

In *Goosman*, a truckdriver involved in an accident completed some reports required by I.C.C. regulations. The court said that the defendants prepared these reports in the ordinary course of business and that they were not protected. The court did not explicitly base its holding not to protect the document on the business character of the documents in question.

<sup>539</sup> See cases cited *supra* note 534.

<sup>540</sup> See, e.g., *Rakus v. Erie-Lackawanna R.R.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1032-33 (N.D. Ga. 1974); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118-19 (N.D. Ga. 1972); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972).

<sup>541</sup> See, e.g., *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (plaintiff's insurer's agent refused to turn over documents prepared while investigating claim because they also supposedly were prepared in anticipation of litigation); see also *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972).

<sup>542</sup> See, e.g., *Soeder v. General Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (defendant manufacturer routinely produced accident reports after crashes of its airplanes but claimed all reports also were prepared in anticipation of litigation); *Rakus v. Erie-Lackawanna R.R.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977) (defendant claimed it produced, in anticipation of litigation, an accident report that it had been required to produce by normal operating procedures and I.C.C. regulations); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029,

tercompany documents that otherwise would be available for discovery will become unavailable.<sup>543</sup> As one court stated, the 1970 amendments,<sup>544</sup> "which were believed to be a liberalization of the scope of discovery would be a foreclosure of discovery of almost all internal documents of insurance companies relating to the claims of insureds [if work product protection applied]."<sup>545</sup>

Some courts also use an ordinary course of business exception to restrict the extension of work product protection to nonlawyers,<sup>546</sup> even though rule 26(b)(3) explicitly applies to a party's "consultant, surety, indemnitor, insurer, or agent."<sup>547</sup> The court in *Thomas Organ v. Jadranska Slobodna Plovidba*<sup>548</sup> justified discrimination against nonlawyers by arguing that the protection of rule 26(b)(3) was intended to extend only to documents prepared by a nonlawyer at a lawyer's request.<sup>549</sup> The court presumed that without lawyer participation in some form, the materials sought were ordinary business documents and thus ineligible for work product protection.<sup>550</sup> Courts can apply an ordinary course of business exception to limit rule 26(b)(3)'s protection in this context because work

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1032-33 (N.D. Ga. 1974) (routine report prepared after crash of helicopter manufactured by defendant).

<sup>543</sup> See *Rakus v. Erie-Lackawanna R.R.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977) (If all routine reports are considered to be prepared in anticipation of litigation, "all discovery of intercompany reports would be subject to the requirements of rule 26(b)(3) in any case where the company maintained a claims department. This position is untenable."); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1033 (N.D. Ga. 1974); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 373 (N.D. Ill. 1972) (if rule 26(b)(3) protects routinely prepared insurance company documents, "hardly any document authored by or for an agent of an insurance company could ever be discoverable . . .").

<sup>544</sup> The 1970 amendments included the present Federal Rule of Civil Procedure 26(b)(3).

<sup>545</sup> *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 373 (N.D. Ill. 1972).

<sup>546</sup> See *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 402 (E.D. Va. 1975) (reports filed by employees in ordinary course of business are not work product even if report was prepared at lawyer's direction); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1033 (N.D. Ga. 1974); *Galambus v. Consolidated Freightways Corp.*, 64 F.R.D. 468, 472-73 (N.D. Ind. 1974) ("statement of employees in the regular course of business and not solely to aid counsel may be inspected"); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372-73 (N.D. Ill. 1972); *Universal Vendors, Inc. v. Candimat Co. of Am.*, 16 Fed. R. Serv. 2d (Callaghan) 1329, 1330 (E.D. Pa. 1972) (presuming that if party prepares documents without attorney's request, it does so in ordinary course of business); *infra* notes 647-69 and accompanying text. See generally Note, *Discovering Investigative Reports*, *supra* note 197.

<sup>547</sup> FED. R. CIV. P. 26(b)(3).

<sup>548</sup> 54 F.R.D. 367 (N.D. Ill. 1972).

<sup>549</sup> [The] trend which was followed in the framing of Rule 26(b)(3) compels the Court to conclude that *any* report or statement made by or to a party's agent (other than to an attorney acting in the role of counsellor), which has not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business and thus not within the purview of the limited privilege of new Rule 26(b)(3).

*Id.* at 372.

<sup>550</sup> *Id.*

prepared by nonlawyers can frequently be described as having been produced in the ordinary course of business.

In sum, an ordinary course of business exception can help courts further the open discovery policy of the Federal Rules in two ways. First, the exception can be used to limit the number of insurance company and internal company documents that will be protected from discovery. Second, the exception can be used to restrict the protection afforded documents prepared by nonlawyers.

Several courts<sup>551</sup> and commentators<sup>552</sup> have criticized the use of the ordinary course of business factor as a discrete exception to rule 26(b)(3). Professors Moore and Lucas have objected to "the apparent violence [an ordinary course of business exception] does to both the history and the language of the Rule . . .,"<sup>553</sup> and one court has asserted that it "twists the language of the Rule so as to not bestow upon insurance companies an allegedly undeserved benefit."<sup>554</sup> Other critics note that denying work product protection to documents prepared by a claims adjuster may discourage him from reporting all his thoughts and ideas regarding a claim and consequently, "an insurance company's claims evaluation process as a whole might be disrupted."<sup>555</sup>

Some courts criticizing the use of an ordinary course of business exception advocate instead that courts examine the facts of each case when dealing with insurance company or internal company documents.<sup>556</sup> Authorities on both sides of the dispute agree that insurance companies, in the preliminary stages of claims investigation, worry not so much about litigation as "whether to resist the claim . . . or to reim-

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<sup>551</sup> See, e.g., *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 17 (D. Md. 1980); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980); *United States v. AT&T*, 85 F.R.D. 603, 628 (D.D.C. 1979); *Spaulding v. Denton*, 68 F.R.D. 342, 345 (D. Del. 1975) ("[The Thomas Organ court's] flat requirement of a lawyer's involvement raises a bump which the 1970 Amendments had smoothed over."); *Almaguer v. Chicago, R.I. & P.R.R.*, 55 F.R.D. 147 (D. Neb. 1972) (decided two months after *Thomas Organ* and does not cite to it).

<sup>552</sup> See 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[3], at 102-03 ("[W]ith deference the authors are of the opinion that the *Thomas Organ Co.* decision is a misinterpretation of the purpose and effect of the 1970 revision.").

<sup>553</sup> *Id.* at 103.

<sup>554</sup> *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980).

<sup>555</sup> *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

<sup>556</sup> See, e.g., *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982); *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 18 (D. Md. 1980); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980); *Spaulding v. Denton*, 68 F.R.D. 342, 345-46 (D. Del. 1975) (discussing possible behavior modification resulting from general rule like that put forth in *Thomas Organ Co.*'s stating approach of looking "at facts of each case," and rejecting any general rule).

burse the insured and forget about the claim thereafter.”<sup>557</sup> At some point, however, these companies do become concerned about the contingency of litigation,<sup>558</sup> and a court, when faced with a discovery dispute concerning these types of documents, must examine the facts in each case to fix that point in time. Rule 26(b)(3) mandates such a factual inquiry because the plain language of, and purposes behind, the rule require that materials be prepared in anticipation of litigation to qualify for protection. The rule does not condition such qualification on a party's business practices or the use of nonlawyers in preparing materials.

### 3. *Critique of the Ordinary Course of Business “Exception”*

Although the concerns of courts using an ordinary course of business exception are understandable,<sup>559</sup> the exception upsets the effective operation of rule 26(b)(3).<sup>560</sup> The rule asks courts first to make a factual determination of whether documents qualify for work product protection by having been prepared in anticipation of litigation, and then to determine whether the material should be protected in light of the discovering party's need for that material. This system makes discovery of trial preparation documents relatively difficult and provides the work product doctrine with the predictability it needs to function properly.<sup>561</sup> The ordinary course of business exception harms the rule's effectiveness by altering this framework. Moreover, the exception is unnecessary to further the concerns of the courts who advocate it because the existing two-part test contained in rule 26(b)(3), if applied correctly, can accommodate those concerns.<sup>562</sup> Therefore, a court should treat the ordinary course of business criterion as merely one factor among many when applying the anticipation-of-litigation test.

Courts employing an ordinary course of business exception voice legitimate concerns.<sup>563</sup> First, according work product protection to materials prepared for internal use by manufacturing and insurance companies works against the open discovery policy of the Federal Rules. Second, the courts may be disenchanted with rule 26(b)(3)'s supposed

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<sup>557</sup> *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 373 (N.D. Ill. 1972), *quoted in* *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

<sup>558</sup> *See* *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979) (“At a certain point an insurance company's activity shifts from the ordinary course of business to anticipation of litigation.”).

<sup>559</sup> *See supra* notes 540-50 and accompanying text (explanation of concerns prompting ordinary course of business exception); *see also infra* notes 563-66 and accompanying text (discussing legitimacy of those concerns).

<sup>560</sup> *See infra* notes 567-70 and accompanying text.

<sup>561</sup> *See infra* notes 571-76 and accompanying text.

<sup>562</sup> *See infra* notes 577-79 and accompanying text.

<sup>563</sup> *See supra* notes 540-50 and accompanying text.

codification of the work product doctrine enunciated by *Hickman*—especially with respect to its treatment of nonlawyer work product<sup>564</sup>—which applied to *lawyers* alone, not to other representatives of a party.<sup>565</sup> Finally, courts may have trouble applying rule 26(b)(3) as it gets further away from the roots of the work product doctrine. They may apply a tougher anticipation-of-litigation standard to the report of an insurance investigation because they do not feel the legal profession will be seriously undermined if they allow discovery of the report. Similarly, some courts may feel that if the work product doctrine of *Hickman* is a reflection of the broad policy of protecting lawyer thought processes, the doctrine should never have been extended to nonlawyers.<sup>566</sup>

Attempts to remedy these concerns through use of an ordinary course of business exception, however, interfere with the two-stage analysis required by rule 26(b)(3).<sup>567</sup> Adding determinative factors such as the ordinary course of business exception to the anticipation-of-litigation test upsets the rule's balance which was designed to make it difficult to discover trial preparation materials. Normally, discovery under the Federal Rules is party-propelled. When one party raises a work product objection, however, the court must become involved. If the party opposing discovery succeeds in showing that the material in question is prepared in anticipation of litigation, then the party seeking discovery has the burden of showing its substantial need for that material.<sup>568</sup> If, however, a court adds collateral requirements to the anticipation-of-litigation test, which the party opposing discovery cannot meet, the party seeking discovery can prevail without making any showing of need, a result not contemplated by the rule.<sup>569</sup> Furthermore, a court predisposed to grant discovery, perhaps because it seeks to further an open discovery policy, will probably do so after performing the second part of the 26(b)(3) analysis, the needs test, even if it must first admit that the

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<sup>564</sup> But see 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2023, at 193 (rule 26(b)(3) "is an accurate codification of the doctrine announced in the *Hickman* case . . ."); *supra* note 9 and accompanying text.

<sup>565</sup> See *supra* note 9 and accompanying text.

<sup>566</sup> But see *infra* note 695 and accompanying text (discussing privacy rationale for work product doctrine).

<sup>567</sup> See *supra* text accompanying notes 560-62 (explanation of rule 26(b)(3)'s two-step analysis); *supra* notes 230-31 and accompanying text (same).

<sup>568</sup> See *infra* note 230.

<sup>569</sup> See FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 501 (1970). The Advisory Committee notes state that

the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.

material in question meets the anticipation-of-litigation test.<sup>570</sup> A party who would like to see such material only if it can be easily obtained, however, may not pursue discovery if he must make some showing of need to obtain the material. The ordinary course of business exception, then, makes material discoverable that the rule would otherwise protect.

Creation of an ordinary course of business exception to the anticipation-of-litigation test also mars the rule's framework because it limits the predictability of judicial resolution of work product problems. Rule 26(b)(3) allows lawyers and other agents of a party to produce material while preparing for litigation with the security of knowing that such material will not be subject to discovery.<sup>571</sup> These representatives must have a fairly accurate idea of when their work will be protected by the rule.<sup>572</sup> Consistent decisions further predictability, but consistency is difficult to attain in this area. Because every work product dispute requires a factual determination of whether the party's representative prepared the material in anticipation of litigation, inconsistent determinations will inevitably result, especially in view of the broad discretion trial courts possess in granting discovery.<sup>573</sup> Even if material qualifies for work product protection, a judge can still order that the material be turned over if the party seeking discovery makes the required showing of need.<sup>574</sup> Nevertheless, the rulemakers felt that the rule 26(b)(3) approach provides lawyers and other representatives enough security to function properly within the adversary system.<sup>575</sup> Adding requirements to the anticipation-of-litigation test that allow courts to further perhaps unstated policy goals that parties will be unaware of when preparing for litigation can only undermine the predictability of work product decisions and the atmosphere of security that predictability fosters. Certainly, the fact that some courts apply an ordinary course of business exception, while others follow the explicit dictates of rule 26(b)(3),<sup>576</sup> creates an inconsistency which undermines predictability.

Finally, proper application of the rule 26(b)(3) two-part analysis adequately addresses the concerns underlying the ordinary course of business exception. After making a factual determination of whether materials sought to be discovered were prepared in anticipation of liti-

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<sup>570</sup> See *infra* notes 577-79 and accompanying text (discussing discretion inherent in application of "needs" test).

<sup>571</sup> See *supra* notes 163-75 and accompanying text.

<sup>572</sup> See *supra* note 175; cf. Note, *supra* note 170, at 819-20 (best test for work product protection would be one that is predictable for attorneys).

<sup>573</sup> *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977), quoted in *Arnold v. IBM*, 637 F.2d 1350, 1359 (9th Cir. 1981) ("In granting discovery, the trial court is vested with broad discretion . . .").

<sup>574</sup> FED. R. CIV. P. 26(b)(3); see *supra* notes 556-70 and accompanying text.

<sup>575</sup> See *supra* note 569.

<sup>576</sup> Compare cases cited *supra* note 534 (courts recognizing exception) with cases cited *supra* note 551 (courts criticizing use of exception).



gation, courts evaluate the discovering party's need for the material in the preparation of his case and his ability to obtain the substantial equivalent without undue hardship.<sup>577</sup> Courts have great discretion in determining whether a party has demonstrated substantial need.<sup>578</sup> Thus, the "needs" test of rule 26(b)(3) allows courts to consider policy in deciding whether to grant work product protection.<sup>579</sup> In an accident case, for example, a court might worry that because a large amount of information about the accident is available only in the defendant insurance company's internal documents prepared in anticipation of litigation, the plaintiff will not be able to fully develop his case if the materials receive work product protection. The court may order discovery of the documents because of the plaintiff's substantial need. In doing so, the court can take its concern for increased open discovery into account.

In sum, because of the problems the ordinary course of business exception creates, courts should abandon it and instead follow the rule 26(b)(3) framework. When faced with a work product problem, a court should decide first, on the basis of the facts of the case, whether the material was prepared in anticipation of litigation, and second, whether the party seeking discovery of the material has substantial need for it.

#### B. Applicability of the Work Product Doctrine to Material Prepared for Prior Litigation<sup>580</sup>

Courts and commentators have struggled with the question of whether the work product doctrine protects material prepared by a party for cases prior to the one in which discovery is sought.<sup>581</sup> Some courts have refused to protect material prepared for prior litigation in subsequent cases.<sup>582</sup> Others have held that such material may be pro-

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<sup>577</sup> FED. R. CIV. P. 26(b)(3).

<sup>578</sup> Note, *supra* note 392, at 878 ("The determination of substantial need is a matter wholly within the discretion of the court.").

<sup>579</sup> See *supra* notes 230-40 and accompanying text.

<sup>580</sup> This section deals specifically with situations in which one party seeks to discover documents prepared for prior litigation by another party or the party's representative. For a discussion of whether nonparties may use the work product doctrine to resist discovery of materials prepared for other litigation or for litigation that has not yet arisen, see *infra* notes 626-44 and accompanying text.

<sup>581</sup> See generally Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412 (1983).

The prior litigation question can be framed through rule 26(b)(3) by asking whether "anticipation of litigation" applies only to material prepared for "this" litigation or if it also applies to material prepared for prior litigation. Nevertheless, the prior litigation question was frequently litigated before the adoption of rule 26(b)(3) in 1970, and it is an issue today in work product cases when the rule does not apply. This discussion therefore centers generally on the prior litigation question (also called the subsequent litigation question), and notes when certain policies apply only to special rule or nonrule situations.

<sup>582</sup> See *infra* notes 586-97 and accompanying text.

tected in subsequent, related cases.<sup>583</sup> Most courts that have addressed this issue have agreed, however, that such material may be protected in subsequent, unrelated cases.<sup>584</sup> The Supreme Court has also apparently accepted this position.<sup>585</sup>

Of the few courts that have held that the work product doctrine applies only to materials prepared in anticipation of the case at hand,<sup>586</sup> none have articulated clear and convincing reasons for doing so. In *Gulf Construction Co. v. St. Joe Paper Co.*,<sup>587</sup> the court explained this approach in light of the policies underlying *Hickman v. Taylor*,<sup>588</sup> arguing that only documents "produced in preparation of a client's case" would be so "intimately concerned with the functioning of the lawyer that their production would have a demoralizing effect on the legal profession."<sup>589</sup> The court did not explain why only discovery of material prepared for existing litigation would have such an effect. The *Gulf Construction* court may have mistakenly believed that *Hickman* was concerned only with combatting the unfairness of allowing a lawyer to use his adversary's work in preparing for the case in which they are both involved.

Another court may have adopted the *Gulf Construction* approach to further the policy of open discovery.<sup>590</sup> In *United States v. IBM*,<sup>591</sup> the court's overriding concern appeared to be the extraordinary number of documents<sup>592</sup> involved in the case. The tone of the court's opinion suggests that the court would grant work product protection only to documents prepared for the case at hand because any other approach would limit open discovery too severely.<sup>593</sup>

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<sup>583</sup> See *infra* notes 598-603 and accompanying text.

<sup>584</sup> See *Panther v. Marshall Field & Co.*, 80 F.R.D. 718, 724 (N.D. Ill. 1978) ("[T]he weight of modern authority supports the conclusion that the work product privilege extends to documents prepared in anticipation of prior, terminated litigation, regardless of the interconnectedness of the issues or facts."); *infra* notes 134-39 and accompanying text.

<sup>585</sup> See *FTC v. Grolier Inc.*, 103 S. Ct. 2209 (1983). For a discussion of this case, see *infra* notes 606-25.

<sup>586</sup> *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977); *United States v. IBM*, 71 F.R.D. 376, 378-79 (S.D.N.Y. 1976), *following* *United States v. IBM*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970) (decided before effective date of 1970 amendments); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F. Supp. 407, 409-10 (M.D. Pa. 1962); *Gulf Constr. Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 414-15 (S.D. Tex. 1959).

<sup>587</sup> 24 F.R.D. 411 (S.D. Tex. 1959).

<sup>588</sup> 329 U.S. 495 (1947).

<sup>589</sup> 24 F.R.D. at 414-15.

<sup>590</sup> See *supra* notes 540-45 and accompanying text (discussion of anticipation-of-litigation requirement and policies favoring open discovery).

<sup>591</sup> 71 F.R.D. 376 (S.D.N.Y. 1976).

<sup>592</sup> The documents at issue numbered 21,800. *Id.* at 377.

<sup>593</sup> *Id.* The court in *United States v. AT&T*, 86 F.R.D. 603, 628 (D.D.C. 1979), also worried that the work product doctrine limits discovery too severely in cases involving large numbers of documents. The court expressed concern that the doctrine might so severely limit discovery in the antitrust case that "there is the prospect of proceeding without large amounts

The court in *In re Grand Jury Proceedings*<sup>594</sup> used unique reasoning to deny work product protection to material prepared for a prior case. The court refused to protect work product materials prepared "for a distinct and prior criminal litigation, long completed" because "the policies underlying the work-product privilege have already been achieved. The only effect of sustaining that conditional privilege now would be to thwart and frustrate the grand jury's investigative task."<sup>595</sup> Because this case involved a grand jury proceeding, the court did not have to follow the rule 26(b)(3) framework in resolving the discovery dispute.<sup>596</sup> If the court had chosen to follow that framework, however, it could have reached the same result by more satisfactory means. The court could have found the material in question to have been prepared in anticipation of litigation, and then taken into account the importance of the grand jury's task in denying the material protection because of the grand jury's substantial need of it.<sup>597</sup>

If material prepared in anticipation of one suit is always denied protection in subsequent litigation, the fear that such materials will be discovered in later litigation may adversely affect a lawyer's trial preparation in the initial action.<sup>598</sup> Recognizing this, some courts have held that work product prepared for a prior case may be protected in a subsequent case if the two cases are related.<sup>599</sup> For example, suppose party *A* produces documents in anticipation of possible litigation growing out of an SEC investigation of a suspicious transaction involving *A*. Some time after the SEC investigation ends, *A*'s former stockholders sue *A* regarding the same transaction and seek to discover material *A* produced in preparing for litigation with the SEC. Can *A* receive work product protection for that material? In a similar situation, the court in *Midland Investment Co. v. Van Alstyne, Noel & Co.*<sup>600</sup> protected the material. The court noted that private actions, such as the one brought by the

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of evidence to the decision of a case involving the structure of the largest economic enterprise in the United States because of a discovery limitation originated in the loss of a tugboat."

<sup>594</sup> 73 F.R.D. 647 (M.D. Fla. 1977).

<sup>595</sup> *Id.* at 653.

<sup>596</sup> "In an independent grand jury proceeding, occurring subsequent to the completed litigation for which the materials were prepared, the work-product privilege is displaced by the grand jury's authority and need to accomplish its investigatorial duty." *Id.*; see also *supra* note 681.

<sup>597</sup> See *supra* notes 577-78 and accompanying text.

<sup>598</sup> See Note, *supra* note 170, at 813-15; see also *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974) ("Should an advocate's thoughts, . . . developed during pending litigation, become discoverable in . . . later litigation . . . our adversary system would clearly suffer."), *cert. denied*, 420 U.S. 997 (1975).

<sup>599</sup> See, e.g., *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Insurance Co. of N. Am. v. Union Carbide Corp.*, 35 F.R.D. 520, 522-23 (D. Colo. 1964).

<sup>600</sup> 59 F.R.D. 134, 138 (S.D.N.Y. 1973).

former stockholders, often follow public actions.<sup>601</sup> Work product protection is warranted in such a situation because *A* may not prepare adequately for the SEC action, fearing that material produced there would be used against *A* in a later suit by a different party.<sup>602</sup> The court in *Midland Investment* thus extended work product protection to material prepared for a prior, related suit because the policy behind work product protection is as applicable in those cases as it is in cases where the disputed material is prepared for the suit at hand.<sup>603</sup>

Many courts take this reasoning to its logical conclusion and hold that material prepared for prior, unrelated litigation should be eligible for protection.<sup>604</sup> As the court in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz* pointed out, the policy goals of the work product doctrine are "scarcely less applicable to a case which has been closed than to one which is still being contested,"<sup>605</sup> whether or not the two cases are

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<sup>601</sup> *Id.*

<sup>602</sup> *Id.*

<sup>603</sup> See also 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2025; 4 J. MOORE & J. LUCAS, *supra* note 2, ¶ 26.64[2], at 26-415 to -416.

<sup>604</sup> See, e.g., *In re Grand Jury Subpoena* Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980); *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 659-60 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 n.15 (4th Cir. 1973) (rejecting "closely related" test, stating: "In our opinion to dispose of this delicate and important question by such a technical touchstone is incompatible with the essential basis of the *Hickman* decision."); *In re International Systems & Controls Sec. Litig.*, 91 F.R.D. 552, 557 (S.D. Tex. 1981), *vacated on other grounds*, 693 F.2d 1235 (5th Cir. 1982); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 585 (E.D. Wis. 1981); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 612 (N.D. Tex. 1981), *rev'd on other grounds*, (available Jan. 31, 1983, on LEXIS, Genfed library, 5th Cir. file); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md. 1974).

<sup>605</sup> 487 F.2d at 483.

One commentator has criticized the *Duplan* court's approach as a deviation from the principle that the work product doctrine was created to protect the adversary system. Note, *supra* note 170, at 818. This commentator accuses the *Duplan* court of believing that the work product doctrine's purpose is "to protect something inherently sacred in the lawyer's preparatory materials, rather than to prevent the potentially injurious consequences flowing from the attorney's anticipation of unlimited discovery." *Id.* This criticism is unwarranted because the opinion is clearly grounded on the notion that work product is meant to protect the adversary system: "*Hickman* clearly stands for the principle that the integrity of the adversary process must be safeguarded in spite of the desirability of the free interchange of information before trial." *Duplan*, 487 F.2d at 482-83. Furthermore, the *Duplan* court emphasized its concern for the policies underlying *Hickman* in noting that the work product doctrine "is the embodiment of a policy that a lawyer doing a lawyer's work in preparation of a case for trial should not be hampered by the knowledge that he might be called upon at any time to hand over the result of his work to an opponent." *Id.* at 483 (emphasis added).

The same commentator expressed concern that the approach taken by the *Duplan* court extends protection to documents prepared by lawyers who could not reasonably anticipate that the documents would be the object of discovery in a later case. Note, *supra* note 170, at 818-19. The commentator suggests that a court should extend protection if, after examining the factual circumstances surrounding preparation of the disputed material, it concludes that a reasonable attorney, in preparing for the initial action, would have recognized the probability of subsequent litigation. *Id.* at 820. If the lawyer did not anticipate such litigation, one can be assured that fear of future discovery did not inhibit the lawyer's trial prepa-

related.

The Supreme Court apparently accepted the *Duplan* court's approach in *FTC v. Grolier Inc.*<sup>606</sup> In *Grolier*, the Court held that the government, when faced with a Freedom of Information Act (FOIA)<sup>607</sup> request, may claim the protection of work product immunity under exemption 5<sup>608</sup> of the FOIA "without regard to the status of the litigation for which it was prepared."<sup>609</sup> Although the Court's holding was limited to an FOIA context, the construction of rule 26(b)(3) that the Court used in reaching its decision makes *Grolier* important in considering the prior litigation question in all work product contexts.

The dispute between the Federal Trade Commission (FTC) and Grolier Incorporated began with an FTC investigation of Grolier's subsidiary, Americana Corporation.<sup>610</sup> The government eventually brought a civil penalty action against Americana, but the case was dismissed with prejudice when the government refused to comply with Americana's discovery request.<sup>611</sup> Grolier then made an FOIA request to obtain the records of the FTC investigation of Americana,<sup>612</sup> which included the documents which Americana had sought in the initial

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ration. One may ask, however, why this test should not be used in every work product case, including those not involving subsequent litigation. Clearly, the difficulty of this kind of factual determination alone is sufficient to make the anticipation-of-litigation test, with its *Duplan* corollary, preferable. The court in *Duplan* adopted this more practical approach by assuming that if a lawyer would alter his behavior out of fear of discovery in the suit at hand, he would also alter it out of fear of discovery in a later suit. 487 F.2d at 483-84.

<sup>606</sup> 130 S. Ct. 2209 (1983).

<sup>607</sup> 5 U.S.C. § 552 (1982).

<sup>608</sup> 5 U.S.C. § 552(b)(5) (1982).

Anyone may make an FOIA request. The government, or a court if the government refuses to comply with a request and the person seeking disclosure takes judicial action under 5 U.S.C. § 552(a)(4)(B) (1982), may not weigh the needs of the person making the request when considering whether to release the requested material. *See Kent Corp. v. NLRB*, 530 F.2d 612 (5th Cir. 1976); *see also supra* notes 218-21 and accompanying text. The government, however, can justify withholding certain documents if one of the nine exemptions from mandatory FOIA disclosure is applicable. *See* 5 U.S.C. 552(b) (1982) (listing exemptions). Exemption 5 of FOIA allows the government to withhold any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5) (1982). The Supreme Court has held that this exemption protects attorney work product from disclosure, *see FTC v. Grolier Inc.*, 103 S. Ct. 2209 (1983), although the protection of this exemption may not be coextensive with that provided by rule 26(b)(3). The Court in *Grolier* stated the test for protection under exemption 5 as "whether the documents would be 'routinely' or 'normally' disclosed" in a civil litigation. 103 S. Ct. at 2214. Thus, in deciding work product questions under exemption 5 which are not answered in rule 26(b)(3) or Supreme Court precedent, *Grolier* dictates that courts should look to the majority rule prevailing in the lower federal courts to discern what the "routine" method of resolving that question has been. *See id.* *But see id.* at 2217-18 (Brennan, J., concurring) (criticizing the above-stated test).

<sup>609</sup> 103 S. Ct. at 2215.

<sup>610</sup> *Id.* at 2211.

<sup>611</sup> *Id.*

<sup>612</sup> *See id.* at 2211 n.2 (FOIA request at issue).

actions.<sup>613</sup>

The issue confronting the Court in *Grolier* was whether the government may refuse to comply with an FOIA request for work product even though no litigation exists or potentially exists related to the case for which the work product was originally prepared.<sup>614</sup> The Court, in concluding that "work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared,"<sup>615</sup> relied on two independent grounds: a literal reading of 26(b)(3)<sup>616</sup> and an interpretation of the scope of protection afforded work product under FOIA exemption 5.<sup>617</sup>

The heart of the Court's first ground of decision in *Grolier* was its reading of rule 26(b)(3) which "does not in so many words address the temporal scope of the work-product immunity . . . [b]ut the literal language of [which] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation."<sup>618</sup> Justice Brennan, in his concurrence,<sup>619</sup> stated that he did not understand the Court's interpretation of the temporal scope of rule 26(b)(3) to be limited to an FOIA context.<sup>620</sup>

Notwithstanding Justice Brennan's conception of the decision, one may not safely assume that *Grolier* definitively settles the prior litigation debate in the area of ordinary civil litigation. The Court confined its holding to the FOIA context by setting out an alternate ground of decision based on a construction of exemption 5<sup>621</sup> and by qualifying its discussion of rule 26(b)(3) with the statement that regardless of the problems the *Grolier* reading of the rule may engender in the civil discovery area, "it provides a satisfactory resolution to the [prior litigation] question"<sup>622</sup> in the FOIA context. Additionally, the Court did not discuss whether the policies underlying the work product doctrine support the Court's literal interpretation of the temporal scope of rule 26(b)(3), as Justice Brennan did in his concurrence.<sup>623</sup>

Nevertheless, the Court did note the substantial lower court support for granting work product protection in subsequent, unrelated

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<sup>613</sup> *Id.* at 2215.

<sup>614</sup> *See id.* at 2212.

<sup>615</sup> *Id.* at 2215.

<sup>616</sup> *See id.* at 2213.

<sup>617</sup> *See id.* at 2214-15.

<sup>618</sup> *Id.* at 2213-14 (citation omitted) (emphasis in original).

<sup>619</sup> *Id.* at 2215 (Brennan, J., concurring). Justice Brennan rested his decision exclusively on the Court's construction of rule 26(b)(3) and rejected the Court's more limited, alternate holding under exemption 5. *Id.*

<sup>620</sup> *Id.* at 2217.

<sup>621</sup> *See id.* at 2214-15; *supra* note 221 (discussing *Grolier* court's treatment of exemption 5).

<sup>622</sup> 103 S. Ct. at 2213.

<sup>623</sup> *Id.* at 2215-16 (Brennan, J., concurring).

cases.<sup>624</sup> It examined *Hickman*, the Advisory Committee notes, and the text of rule 26(b)(3)<sup>625</sup> before settling for the construction of the rule which it then employed in resolving the dispute. In sum, *Grolier* sends a strong message of approval to courts seeking to protect work product in subsequent, unrelated cases although it does not finally resolve the question.

### C. Nonparty Work Product

The following discussion deals with the extent to which work product immunity applies to nonparties. In each of the situations analyzed, the work product of a party to the litigation in which the discovery is sought would be protected in the litigation for which it was prepared; the issue is limited to whether protection extends to the situation where the preparer is a nonparty.

#### 1. *Applicability of Rule 26(b)(3) to Nonparty Work Product*

A literal reading of rule 26(b)(3) leads to the necessary conclusion that the scope of the rule's protection does not include nonparty work product. Rule 26(b)(3), on its face, only applies to documents and tangible things "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative."<sup>626</sup> At least one court has read the rule not only to limit its protection to parties, but to totally preclude nonparties from asserting work product immunity.<sup>627</sup>

Professors Wright and Miller find this construction of the rule to be an "intolerable result."<sup>628</sup> They offer the following hypothetical to illustrate the questionable nature of such an interpretation. Suppose *A* and *B* bring separate antitrust suits against the same defendant. Rule 26(b)(3) would protect *A*'s work product from a direct attempt at discovery by the defendant. Under a restrictive reading of the rule that limits its protection to parties, however, *A* would receive no protection from a subpoena duces tecum ordering disclosure of documents issued

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<sup>624</sup> *Id.* at 2214.

<sup>625</sup> *Id.* at 2213.

<sup>626</sup> FED. R. CIV. P. 26(b)(3) (emphasis added). As Professors Wright and Miller explained:

[T]he protection [of rule 26(b)(3)] extends only to documents obtained by "another party" or his representative and in context this rather clearly means another party to the litigation in which discovery is being attempted. . . . [D]ocuments prepared for one who is not a party to the present suit are wholly unprotected even though the person may be a party to a closely related law suit in which he will be disadvantaged if he must disclose in the present suit.

8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 201-02.

<sup>627</sup> See *Prucha v. M & N Modern Hydraulic Press Co.*, 76 F.R.D. 207, 209 (W.D. Wis. 1977) (denying plaintiff right to assert work product immunity for nonparty even though plaintiff and nonparty shared same attorney and had strong common interest in outcome of suit; only by joining action could nonparty assert immunity under rule 26(b)(3)).

<sup>628</sup> 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 202.

by the court hearing the defendant's suit against *B*.<sup>629</sup> Clearly the disadvantage suffered by *A* is the same whether discovery is allowed in his own suit against the defendant or indirectly through *B*'s suit. Although the Advisory Committee notes to rule 26(b)(3) do not clarify the issue, it seems unlikely that the drafters intended such a result.

Wright and Miller offer a solution that will allow courts to "continue to arrive at sensible decisions on this narrow point."<sup>630</sup> They suggest that when rule 26(b)(3) gives the work product of nonparties insufficient protection, "the court can vindicate the purposes of the work product rule by the issuance of a protective order under Rule 26(c)."<sup>631</sup> Although this solution explains *how* a court could protect nonparty work product when the court feels that 26(b)(3) does not cover the issue but protection is warranted, it does not explain *why* courts should grant protection. Thus, one cannot tell how Wright and Miller would handle varied nonparty work product problems.

## 2. *Application of Hickman v. Taylor to Nonparty Work Product*

The conclusion that rule 26(b)(3) not only fails to protect nonparty work product, but also totally precludes application of work product immunity to nonparties, rests on the assumption that the work product doctrine was entirely codified under rule 26(b)(3), and thus that the rule preempts application of the principles of *Hickman v. Taylor*.<sup>632</sup> Courts and commentators have not applied this assumption, however, to other facets of the work product doctrine. For example, although rule 26(b)(3) applies only to "tangible things," most courts have continued to extend work product protection to intangibles as well.<sup>633</sup> The more realistic position is to view rule 26(b)(3) as a partial codification of *Hickman*, and to continue to apply the *Hickman* policies to resolve questions which the rule does not address, such as the applicability of the immunity to nonparty work product.<sup>634</sup>

The courts that have applied *Hickman* to nonparty work product have consistently held that when the potential for adversary relations exists between the party seeking discovery and the nonparty from whom discovery is sought, the nonparty can assert work product immunity.<sup>635</sup>

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<sup>629</sup> *Id.*

<sup>630</sup> *Id.*

<sup>631</sup> *Id.* (footnote omitted).

<sup>632</sup> 329 U.S. 495 (1947).

<sup>633</sup> See *supra* notes 479-96 and accompanying text (discussing protection for intangible work product).

<sup>634</sup> See Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 758 nn. 7-9 (1983) (discussing *Hickman*-rule 26(b)(3) dichotomy).

<sup>635</sup> See *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 337-38 (S.D.N.Y. 1969) (allowing nonparty to assert work product immunity when documents in question were prepared in anticipation of litigation with party seeking discovery and interests of nonparty were



This position is entirely consistent with the policies of *Hickman*. The concerns of *Hickman* apply with as much force to a nonparty who prepares work product in anticipation of litigation as they do to an actual party to the litigation. Fundamental *Hickman* concerns, including effective trial preparation, prevention of "sharp practices," and concern for demoralization of attorneys, are as applicable to a nonparty anticipating litigation as they are to a party presently involved in litigation.<sup>636</sup> This reasoning takes on even greater force when a separate litigation between the party and nonparty has already arisen.<sup>637</sup>

*Republic Gear Co. v. Borg-Warner Corp.*<sup>638</sup> is a leading case on work product immunity for nonparties that was decided before the 1970 amendments and therefore looks directly to the policies behind *Hickman* in reaching its result. In *Republic Gear*, the plaintiff, Republic, brought a diversity action against Borg-Warner in which Republic claimed that Borg-Warner had tortiously interfered with contractual relations between Republic and two Brazilian corporations, Maquinas York (York) and Industrial Automobilstica Borton (Borton). Republic also brought actions against York and Borton that were dismissed for lack of jurisdiction and were on appeal.<sup>639</sup>

In its action against Borg-Warner, Republic subpoenaed from the attorney for York and Borton letters that Republic claimed would prove that inducements by Borg-Warner caused York and Borton to break off contractual relations with Republic. Republic had previously attempted to discover the letters in its suit against York and Borton, but the court determined that the letters were work product and thus protected from discovery.<sup>640</sup>

The court in *Republic Gear* concluded that the attorney for Borton and York, a nonparty, could assert work product immunity. The court distinguished cases in which nonparties had been denied work product immunity<sup>641</sup> by noting that in those cases, the litigation for which the

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"substantially identical" with the party's adversary); cf. *United States v. AT&T*, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (allowing nonparty to intervene to assert work product immunity when discovery of documents held by party but prepared by nonparty was sought). For a detailed discussion of *United States v. AT&T*, see *infra* notes 775-86 and accompanying text.

<sup>636</sup> See, e.g., *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969) ("[S]ince the privilege appears to become operative upon preparation of the document, the additional circumstance that litigation has not yet materialized at the time discovery is sought should not alter the conclusion that the privilege is applicable.").

<sup>637</sup> See *supra* text accompanying notes 629-30.

<sup>638</sup> 381 F.2d 551 (2d Cir. 1967).

<sup>639</sup> *Id.* at 553.

<sup>640</sup> *Id.*

<sup>641</sup> See, e.g., *Tobacco & Allied Stocks Inc. v. Transamerica Corp.*, 16 F.R.D. 534 (D. Del. 1954). In *Tobacco*, the court denied work product immunity where the defendant sought discovery of documents prepared by the plaintiff's attorney while representing a different party to a related, but completed, litigation. The result in *Tobacco* can be explained best by the lack of adversary relations between the party seeking discovery and the nonparty for whom the

materials had been prepared had been completed.<sup>642</sup> In the *Republic Gear* case, by contrast, litigation between Republic and York and Borton remained a very real possibility.<sup>643</sup> Thus, as the court stated:

[T]he broad purpose of the [work product] rule which is designed to encourage effective legal representation by removing counsel's fear that his thoughts and information will be invaded by his adversary if he records them would be defeated if Republic could gain access to [the nonparty attorney's] files by proceeding against a party [the attorney] did not . . . represent but nevertheless a party involved in the same transaction in which [the attorney's] former clients were involved.<sup>644</sup>

Given the 1970 amendment to rule 26(b)(3), the continued vitality of *Republic Gear* is uncertain. A restrictive reading of rule 26(b)(3), which would deny work product immunity for all nonparty work product, does little to advance the broad policy goals of *Hickman* and does much to undermine them. The better interpretation is to acknowledge the imperfect overlap between *Hickman* and rule 26(b)(3) and to continue to apply *Hickman* to those areas of the work product doctrine, such as nonparty work product, that rule 26(b)(3) failed to effectively codify.

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documents were prepared. *Hickman's* primary concern is that attorneys be free to prepare thoroughly for trial without unnecessary intrusion by their adversaries. In the area of prior litigation, the doctrine has been expanded to protect work product materials from discovery by future adversaries as well. See *supra* notes 583-631 and accompanying text (discussing work product doctrine in prior litigation). The policies underlying the work product doctrine, however, are not applicable when a party seeks discovery from a nonparty with whom there is no potential for future litigation. An attorney would be hard-pressed to contend that even the likelihood of a nonadversary discovering his work product would affect detrimentally the way in which he prepares for trial.

This is not to say that a nonparty's files would be fair game for any party to a litigation that cannot be contended to be a potential adversary. Even without work product immunity, the party seeking discovery would still have to show the relevancy of the materials sought under Federal Rule of Civil Procedure 26(b)(1). See *Tobacco*, 16 F.R.D. at 536. The attorney-client privilege, furthermore, would continue to apply. In the case of particularly egregious intrusions into the privacy of a nonparty attorney's files, an attorney could also request a protective order under rule 26(c). See *supra* notes 630-31 and accompanying text.

At least one court would extend work product immunity to a nonparty's attorney situated similarly to the attorney in *Tobacco*. In *LaRocca v. State Farm Mut. Auto. Ins. Co.*, 47 F.R.D. 278, 282 (W.D. Pa. 1969), the court found "serious impediments to compelling an attorney to divulge his work product, even though the prior action is ended and his client is not a party to the present action." The court based its decision, however, on a separate privacy interest of the attorney in work product materials that has been rejected by many courts. See *infra* note 695 and accompanying text.

<sup>642</sup> *Republic Gear*, 381 F.2d at 557.

<sup>643</sup> *Id.* at 557 n.5.

<sup>644</sup> *Id.* at 557 (footnote omitted).

#### IV PERSONAL FACTORS

Although *Hickman v. Taylor*<sup>645</sup> and its subsequent codification in Federal Rule of Civil Procedure 26(b)(3)<sup>646</sup> have resolved many of the issues associated with the work product doctrine, some pervasive questions remain. Three particularly troublesome issues are: who can create work product; who can assert work product immunity; and what constitutes waiver of the immunity. Although these questions have been discussed and litigated extensively, no clear resolution has emerged. Thus, the practicing attorney, his client, and their agents cannot determine with certainty whose work will be protected, who will have standing to assert protection, and what use of work product materials may lead to waiver. This section examines these problems in light of the policies behind work product immunity, discusses how the courts and commentators have dealt with the issues, and suggests a way to limit the uncertainty in the area.

##### A. Who Can Create Work Product?

The 1970 amendment to rule 26(b)(3) ostensibly settled the question of who can create work product by adding protection for the work product of nonlawyers.<sup>647</sup> The question, however, remains unsettled even though the policies underlying the work product doctrine favor granting equal treatment to lawyers and nonlawyers and provide the basis for resolving any uncertainties.

##### 1. *Development of Work Product Immunity for Nonlawyers*

Before the 1970 amendment to rule 26(b)(3), the courts split among three main positions on whether to extend protection to nonlawyer work product. First, under the *Allmont v. United States*<sup>648</sup> position, courts extended the *Hickman* rationale for immunity to all documents prepared for use at trial.<sup>649</sup> Second, courts following the *Southern Railway v. Lan-*

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<sup>645</sup> 329 U.S. 495 (1947).

<sup>646</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981).

<sup>647</sup> No attempt is made in this subsection to distinguish cases on a rule-nonrule basis because the policies underlying the issue of who can create work product apply to both rule and nonrule situations.

<sup>648</sup> 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

<sup>649</sup> [W]e think that [*Hickman's*] rationale has a much broader sweep and applies to all statements of prospective witnesses which a party has obtained for his trial counsel's use. . . . [W]e can see no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and those obtained by others for use of the party's trial counsel.

*Allmont v. United States*, 177 F.2d at 976; see also *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970); 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 205-06 ("But if

*ham*<sup>650</sup> position held that only mental impressions of nonlawyers receive work product protection.<sup>651</sup> Finally, courts following *Burke v. United States*<sup>652</sup> protected only work supervised by an attorney and involving legal skill.<sup>653</sup>

The 1970 amendment to rule 26(b)(3) expanded the scope of protection to the work of a party's "consultant, surety, indemnitor, insurer, or agent."<sup>654</sup> The Advisory Committee notes regarding this topic concluded that "the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though *not necessarily to the*

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statements of witnesses are to be protected from discovery at all, the protection should not depend on who obtained the statement.").

<sup>650</sup> 403 F.2d 119 (5th Cir. 1968).

<sup>651</sup> The Fifth Circuit in *Lanham* held that the ordinary work product of a claims agent is not protected because "[s]uch statements are usually essential to the proper defense of the action," and because allowing discovery would not be likely to alter defendant's activities. 403 F.2d at 129. As the court noted: "It is not likely that defendants in accident cases will cease taking statements simply to avoid discovery." *Id.* The court added, however, that discovery of "documents reflecting the mental processes and impressions of claim agents or investigators should be conditioned upon a strong showing of 'necessity or justification.'" *Id.* at 131; *see also* *Richards-Wilcox Mfg. Co. v. Young Spring & Wire Corp.*, 34 F.R.D. 212, 213 (N.D. Ill. 1964) (purely factual statements gathered by observer are not work product).

<sup>652</sup> 32 F.R.D. 213 (E.D.N.Y. 1963).

<sup>653</sup> The court in *Burke* denied protection for a nonlawyer's work product because "[t]here is no showing that the materials represent the product of the training, skill or knowledge of an attorney, which the work product privilege is aimed at protecting." *Id.* at 214; *see also* *Groover, Christie & Merritt v. Lo Bianco*, 336 F.2d 969, 973-74 (D.C. Cir. 1964) (Wright, C.J., dissenting) (documents prepared by unsupervised defendant are not work product); *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 247, 250 (E.D. Pa. 1968); *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 419-20 (D. Del. 1959).

As a corollary to the position taken in *Burke*, some courts have held that for documents to receive protection, lawyers must exercise legal skill in their preparation. *See, e.g.*, *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969); *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 247, 250-51 (E.D. Pa. 1968); *United States v. Anderson*, 34 F.R.D. 518, 521 (D. Colo. 1963); *Burke v. United States*, 32 F.R.D. 213, 214-15 (E.D.N.Y. 1963); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953); *Bifferato v. States Marine Corp.*, 11 F.R.D. 44 (S.D.N.Y. 1951); *see also* Note, *Attorney's Work Product Privilege*, *supra* note 250, at 560-69 (discussing nonlawyer work product coverage prior to 1970 amendments to Federal Rules); Comment, *supra* note 250, at 477-78, 481-82 (asserting that legal skill involved in *Hickman* is requirement for work product protection). *But see* *LaFrance*, *supra* note 33, at 372-77 (criticizing legal skill requirement as "defective in its basic assumption"). *See generally* *Developments*, *supra* note 2, at 1032-33 (arguing for legal skill requirement).

Courts have used this legal skill requirement to exclude protection for attorneys functioning as investigators or in other capacities outside the normal role of the attorney. *See* *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 44 (N.D. Ill. 1969) (questioning to reconstruct witness's grand jury testimony is not work product because lawyer is acting as investigator); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264, 267-68 (D. Colo. 1963) (witness's statement that was not "result of skillful questioning by the attorney" is not work product).

<sup>654</sup> Fed. R. Civ. P. 26(b)(3).

same extent).<sup>655</sup> Although the parenthetical contradicts the absolute nature of the rule and would buttress a case of discovery of nonlawyer work product, no reported cases refer to it for support.

The *Allmont* position clearly represents the weight of authority referred to by the Advisory Committee, and the rule explicitly covers all materials prepared by or for the party's agent. Moreover, the rule does not provide any support for the other two positions. Neither the rule nor the notes draw the *Lanham* distinction between ordinary and opinion work product of a nonlawyer, and no mention is made of attorney supervision or legal skill as required by *Burke*. The Advisory Committee notes indicate that the only substantial requirement for work product protection is anticipation of litigation by the preparer.<sup>656</sup>

Unfortunately, the Advisory Committee notes provide neither prospective guidelines for implementation nor a discussion of the importance of the different policies bearing on this part of the rule.<sup>657</sup> Perhaps a fuller explanation by the Committee of its protection of nonlawyer work product would have led to fewer anomalous holdings since rule 26(b)(3)'s enactment. For example, some courts abide by the rule and grant protection to nonlawyer work product, formulating their analyses solely in terms of anticipation of litigation.<sup>658</sup> Other courts, however, flatly ignore the rule and apply the gamut of pre-amendment analyses.<sup>659</sup> Still other courts use the "ordinary course of business" exception to the anticipation-of-litigation requirement to deny nonlawyer work product protection.<sup>660</sup>

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<sup>655</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970) (emphasis added).

For some reason, the Committee combined the notes on nonlawyer work product with the notes on opinion work product. The only logical explanation for this conjunction is appearance: the opinion work product section of the notes cites no cases, whereas the "whose work product" section provides extensive case citations. Thus, at first glance, the notes resemble one balanced section instead of two distinct sections. On the other hand, this awkward construction could have been the result of Committee politics and might signal the de-emphasis of the preparer in post-amendment decisions.

<sup>656</sup> FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970) ("Subdivision (b)(3) . . . requir[es] a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.") (emphasis added).

<sup>657</sup> See *id.*

<sup>658</sup> See *supra* notes 556-58 and accompanying text.

<sup>659</sup> See, e.g., *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975) (in discussing work product, no references to 1970 rule or any cases post-1970, but extensive citation of pre-1970 cases); *Dixon v. Cappellini*, 88 F.R.D. 1 (M.D. Pa. 1980) (refusing to protect psychiatric reports because they lacked legal skill in preparation although the reports were admittedly prepared in anticipation of litigation).

<sup>660</sup> For a discussion of how courts have handled nonlawyer work product since the enactment of rule 26(b)(3), see *supra* notes 533-58 and accompanying text.

If the rule is clear, why do some courts continue to restrict protection of nonlawyer work product based on the identity of the preparer? Perhaps these courts have relied too heavily on the rule of thumb that material not prepared at a lawyer's request probably was not

## 2. *Justifications for Protecting Nonlawyer Work Product*

The policies underlying the work product doctrine support protection of nonlawyer work product. Broad coverage of both lawyer and nonlawyer work product preserves the functional integrity of the various professionals involved in preparing a case. If the work product doctrine did not protect nonlawyer work product, lawyers might take over the roles now performed by nonlawyers in order to ensure that the work product doctrine protected the material now usually prepared by nonlawyers. Professionals should not distort their roles in order to abuse work product protection;<sup>661</sup> a lawyer, for example, should not play the role of investigator in order to qualify the resulting investigative material for immunity. Broad coverage thus encourages two fundamental goals of the adversary system—greater efficiency and accuracy. With such coverage, attorneys have more time to prepare for trial<sup>662</sup> because they need not perform investigative work.<sup>663</sup> In addition, investigations performed by trained professionals are probably of higher quality.

Further, some jurists justify the work product rule with the assertion that attorneys should not be called to testify to the accuracy of their work product.<sup>664</sup> Although this justification does not apply directly to nonlawyers, if nonlawyer work is denied protection, attorneys will not delegate even marginally legal functions to their agents. As the Supreme Court recognized in *United States v. Nobles*,<sup>665</sup> such delegation is necessary in modern litigation.<sup>666</sup> Thus, the need to encourage attor-

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prepared in anticipation of litigation. See *supra* notes 525-23, 531-32 and accompanying text. Perhaps also, courts denying protection to nonlawyer work product have implicitly accepted the rationale that lawyer work product should be protected because of a lawyer's special privacy interests apart from the adversary system. See *supra* notes 563-66 and accompanying text; see also *infra* note 695 and accompanying text.

<sup>661</sup> See McGanney & Seidel, *supra* note 389, at 24, 26-27; Nordenberg, *supra* note 240, at 590 ("The . . . work product protection [is] not, . . . when properly applied, identified as [a] major [obstacle] to the search for the truth. The abuse of [it] is . . . thought to be a specie of modern discovery problems . . .").

<sup>662</sup> See *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (attorneys should be free to prepare for trial without constant interruptions from other parties).

<sup>663</sup> [A]llowing discovery of reports prepared at a lawyer's request might encourage trial counsel personally to bear more of the burden of trial preparations . . . in the hope that more of his work would be immune from discovery. This would perhaps leave him less time for work requiring more legal talent . . . and thus impede effective preparation of his case.

*Developments, supra* note 2, at 1031 (footnote omitted).

Another reason to avoid distortion of the nonlawyer professional's functions is economic efficiency. Attorneys are usually more expensive than investigators and litigants with limited resources cannot afford to use attorneys to shield the investigation from discovery.

<sup>664</sup> See *Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring). But see *supra* notes 172-73 and accompanying text (discrediting this basis for work product doctrine).

<sup>665</sup> 422 U.S. 225 (1975).

<sup>666</sup> *Id.* at 238 ("[A]ttorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the [work product] doctrine protect material prepared by agents for the attorney . . .").

neys to delegate work to their agents and to spend more time preparing for trial counterbalances any reason to deny protection because of lack of the attorney-witness factor.<sup>667</sup>

### 3. *Analysis and Recommended Formulation*

Protection of ordinary work product should depend on whether material was prepared in anticipation of litigation, and not on the preparer's status as an attorney or nonattorney.<sup>668</sup> Admittedly, equal treatment of lawyers and nonlawyers creates evidentiary problems in applying the anticipation-of-litigation test, but courts can use various rules of thumb when making that determination.<sup>669</sup> By viewing the "who can create work product" question as almost entirely a question of anticipation of litigation, courts achieve a more efficient allocation of legal resources. Lawyers will have more time for preparation and parties who attempt their own investigations will not be penalized. Also, the anticipation-of-litigation framework provides a more forthright approach to denying work product protection to nonlawyers than does a routine application of the "ordinary course of business" exception.

### 4. *Conclusion*

The 1970 amendment to rule 26(b)(3) eliminated the technical distinction between lawyers and nonlawyers. The rule effectively abolishes the need to determine the preparer's status and replaces it with a different form of analysis: whether or not the materials were prepared in anticipation of litigation. This analysis better fulfills the policies of *Hickman* and the functions of work product protection.

## B. Who Can Assert Work Product Immunity?

A question closely related to who can create work product is who can assert work product immunity or, perhaps more appropriately, who has standing to assert the immunity. The issue of standing to assert work product immunity, which arises most often when an attorney and his client are no longer acting in unison and one or the other seeks to assert the immunity individually, may occur in three basic situations: where the interests of the attorney and his client are in conflict and the attorney seeks to deny his client access to work product materials;<sup>670</sup> where the client or his attorney wishes to waive or has waived immunity and the other continues to seek protection for the materials;<sup>671</sup> or where

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<sup>667</sup> See *Developments*, *supra* note 2, at 1031.

<sup>668</sup> See, e.g., *United States v. Chatham City Corp.*, 72 F.R.D. 640, 642-43 (S.D. Ga. 1976).

<sup>669</sup> See *supra* notes 525-32 and accompanying text.

<sup>670</sup> See *Spivey v. Zant*, 683 F.2d 881 (5th Cir. 1982); *In re Kaleidoscope, Inc.*, 15 Bankr. 232 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 Bankr. 729 (N.D. Ga. 1982).

<sup>671</sup> See *SEC v. National Student Mktg. Corp.*, 18 Fed. R. Serv. 2d (Callaghan) 1302

either the client or his attorney has taken part in activities that fall within the crime-fraud exception without the other's knowledge and the nonviolating party seeks to continue protection.<sup>672</sup> One additional circumstance in which standing to assert work product immunity may be at issue is where work product is in the hands of a nonparty and the party who produced the materials wishes to prevent their disclosure to his adversary.<sup>673</sup>

1. *In What Types of Actions Can Work Product Immunity Be Asserted?*

A threshold question to that of who can assert work product immunity is in what types of actions can the immunity be asserted. Although the main concern of this Note is the application of the work product doctrine to civil discovery, a complete analysis requires a brief look at what the courts have said about work product immunity in other areas. Indeed, the willingness of courts to apply principles of work product immunity to civil discovery, even though they may have been developed, for example, in criminal litigation, necessitates such a review.<sup>674</sup>

In recent years the Supreme Court has expanded the work product doctrine to include criminal discovery<sup>675</sup> and IRS tax-investigation summonses.<sup>676</sup> In addition, the United States courts of appeals have recognized a "privilege" to protect attorney work product from subpoena by a grand jury.<sup>677</sup> In all these areas, the courts have applied the basic work product doctrine developed in *Hickman* to extend the scope of work product immunity. The extent to which rule 26(b)(3) applies in each of these settings, however, is not clear; the rule on its own terms applies only to civil discovery. Nevertheless, the Supreme Court in *Upjohn Co. v. United States*<sup>678</sup> assumed, "without firmly holding,"<sup>679</sup> that rule 26(b)(3)

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(D.D.C. 1974); see also *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977).

<sup>672</sup> See *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Moody v. IRS*, 654 F.2d 795 (D.C. Cir. 1981); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980). For a general discussion of the crime-fraud exception, see *supra* notes 440-66 and accompanying text.

<sup>673</sup> See *Norris Mfg. Co. v. R.E. Darling Co.*, 29 F.R.D. 1, 1 (D. Md. 1961); 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2457, at 431; see also *Oliver B. Cannon & Son, Inc. v. Fidelity & Cas. Co.*, 519 F. Supp. 668, 680 (D. Del. 1981); *Dart Indus., Inc. v. Liquid Nitrogen Processing Corp.*, 50 F.R.D. 286, 291 (D. Del. 1970).

<sup>674</sup> See *infra* notes 759-69 and accompanying text (discussing application to civil discovery of waiver doctrine as formulated in criminal proceedings).

<sup>675</sup> *United States v. Nobles*, 422 U.S. 225, 238-40 (1975).

<sup>676</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981).

<sup>677</sup> *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973).

<sup>678</sup> 449 U.S. 383, 397-99 (1981).

<sup>679</sup> *In re Sealed Case*, 676 F.2d 793, 808 n.49 (D.C. Cir. 1982).



does apply to summons-enforcement proceedings via rule 81(a)(3).<sup>680</sup> The applicability of rule 26(b)(3) in grand jury proceedings is also questionable. At least one United States court of appeals has held that rule 26(b)(3) does not apply to such proceedings,<sup>681</sup> and a second has suggested that the Federal Rules should govern procedures of the grand jury, but not supply substantive restrictions.<sup>682</sup>

The foregoing discussion suggests that courts should be cautious in applying decisions rendered in noncivil discovery cases to those situations governed by rule 26(b)(3).<sup>683</sup> This is particularly true in the areas of waiver and exception, where fear of frustrating the efforts of a grand jury may dictate a far stricter standard than that required for adversaries in civil discovery.<sup>684</sup>

## 2. *Assertion of Work Product Immunity by the Attorney and His Client Acting Independently*

Although the courts have established in which types of actions work product immunity can be asserted, they have been less clear on whether work product immunity can be asserted independently by an attorney or his client. The policies underlying the work product doctrine form the framework for an analysis of this question, and an initial comparison with the attorney-client privilege is helpful. Courts have held that the attorney-client privilege belongs solely to the client.<sup>685</sup> The primary in-

<sup>680</sup> "FED. R. CIV. P. 81(a)(3) makes the Federal Rules applicable to 'proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . .'" *Id.*

<sup>681</sup> *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 61 n.17 (7th Cir. 1980) ("Neither Rule 26 of the Federal Rules of Civil Procedure nor Rule 16 of the Federal Rules of Criminal Procedure applies to grand jury proceedings."); *see also In re* Grand Jury Subpoena Dated Nov. 9, 1979, 484 F. Supp. 1099, 1102 (S.D.N.Y. 1980) ("Although the codifications of the doctrine in Rule 26(b)(3) of the Federal Rules of Civil Procedure and 16(b)(2) of the Federal Rules of Criminal Procedure do not govern grand jury proceedings, it is clear that the work product doctrine is applicable to grand jury matters.") (citation omitted).

<sup>682</sup> *In re* Sealed Case, 676 F.2d 793, 808 n.49 (D.C. Cir. 1982).

<sup>683</sup> *See, e.g.,* United States v. Brown, 349 F. Supp. 420, 433 (N.D. Ill. 1972), *aff'd as modified*, 478 F.2d 1038 (7th Cir. 1973).

While it appears that the Supreme Court would consider that the work product doctrine is applicable to a proceeding to enforce an Internal Revenue Summons, this does not mean that the IRS should be bound by the same "good cause" requirement applied in civil litigation as indicated in *Hickman*. . . . [A] modified standard of "good cause" to overcome a claim of privilege based upon the work product doctrine reflects the importance of IRS investigations, the intent of Congress in 26 U.S.C. §§ 7601 and 7602, the purposes of open discovery generally in our legal system, the unique burdens upon the government in rebutting a claim of privilege in [the] IRS investigation context, and the legitimate purposes underlying the qualified privilege based upon the work product doctrine.

349 F. Supp. at 433 (citations omitted).

<sup>684</sup> *See infra* notes 759-69 and accompanying text.

<sup>685</sup> *Moody v. IRS*, 654 F.2d 795, 801 (D.C. Cir. 1981); *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980); *In re* Grand Jury Proceedings (FMC Corp.), 604

terest of the privilege is to assure that a client's statements to his attorney will be protected from disclosure.<sup>686</sup> The client, however, is free to waive this protection by disclosing his otherwise confidential statements to the outside world because it is ultimately the client's interests alone and not his attorney's that are at stake.<sup>687</sup>

In contrast, the work product doctrine, from its inception in *Hickman v. Taylor*,<sup>688</sup> has acknowledged the interests of both the attorney and his client.<sup>689</sup> The Court stated in *Hickman* that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."<sup>690</sup> The Court also noted, however, that without protections for work product materials "the interests of the clients . . . would be poorly served."<sup>691</sup> Most courts and commentators have followed *Hickman's* lead and have acknowledged interests of both the attorney and his client in work product materials.<sup>692</sup> A minority of courts, however, have held that only the attorney may invoke immunity.<sup>693</sup>

Work product immunity protects the integrity and vitality of the adversary system by providing an attorney with a zone of privacy that enables him to be an effective advocate of his client's cause.<sup>694</sup> The

F.2d 798, 801 (3d Cir. 1979); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483 n.12 (4th Cir. 1973); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587 (N.D. Ill. 1981); *Panther v. Marshall Field & Co.*, 80 F.R.D. 718, 725 n.7 (N.D. Ill. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977).

<sup>686</sup> See *infra* notes 739-41 and accompanying text.

<sup>687</sup> See *Moody v. IRS*, 654 F.2d 795, 801 (D.C. Cir. 1981) ("[T]he attorney-client privilege . . . exists solely for the benefit of the client, and can be asserted or waived exclusively by him . . .") (citing *In re Special Sept. 1978 Grand Jury (II)*, 406 F.2d 49, 63 (7th Cir. 1980)).

<sup>688</sup> 329 U.S. 495 (1947).

<sup>689</sup> See *Moody v. IRS*, 654 F.2d at 801 ("Unlike the attorney-client privilege . . . the work product privilege creates a legally protectable interest in non-disclosure in two parties: lawyer and client.") (footnotes omitted).

<sup>690</sup> 329 U.S. at 510-11.

<sup>691</sup> *Id.* at 511.

<sup>692</sup> E.g., *In re Sealed Case*, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982); *In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979); *In re International Systems & Controls Sec. Litig.*, 91 F.R.D. 552, 556 (S.D. Tex. 1981), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982); *Gardner*, *supra* note 134, at 288-97.

<sup>693</sup> See *Panther v. Marshall Field & Co.*, 80 F.R.D. 718, 725 n.7 (N.D. Ill. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977). But see *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979) (citations and footnote omitted):

A lawyer may assert the work product privilege; indeed, it has been said that he alone may invoke it. We are not inclined to accept quite that narrow an application, however. It is not realistic to hold that it is only the attorney who has an interest in his work product or that the principal purpose of the privilege—to foster and protect proper preparation of a case—is not also of deep concern to the client, the person paying for that work. To the extent a client's interest may be affected, he, too, may assert the work product privilege.

<sup>694</sup> See *infra* notes 732-35 and accompanying text.

courts, in interpreting the reach of rule 26(b)(3), have failed to define precisely the bounds of an attorney's zone of privacy. What is clear, however, is that the work product immunity does not create an absolute or independent privacy interest in the attorney. "From its inception, . . . the courts have stressed that the [work product] privilege is 'not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person,' but to protect the adversary trial process itself."<sup>695</sup>

In the large majority of cases, the interests of an attorney and his client are the same and there is no need to articulate separate attorney and client interests in work product immunity. Where, however, their interests are not harmonious, granting an attorney a zone of privacy for his trial preparation materials may not always protect the adversary system. In such settings, courts often feel compelled to articulate a separate client interest in work product materials to deny the attorney work product immunity.<sup>696</sup> An alternative means of reaching the same result, and one that remains more faithful to the underlying policies of the work product doctrine, is to deny work product immunity without creating a separate client interest because protecting an attorney's privacy interest and protecting the interests of the adversary system are incompatible in the particular case.

### 3. *Assertion of Work Product Immunity by the Attorney Where the Interests of the Attorney and His Client Conflict*

The question of whether an attorney can use the work product doctrine to deny his client access to materials in his files has not been heavily litigated.<sup>697</sup> The issue is nonetheless significant because it tests the outside limits of an attorney's right to assert work product immunity.

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<sup>695</sup> *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981) (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980)); see also *Prucha v. M & N Modern Hydraulic Press Co.*, 76 F.R.D. 207 (W.D. Wis. 1977) (denying plaintiff's attorney work product immunity when defendant sought discovery of materials plaintiff's attorney had prepared for a nonparty to the action; only nonparty himself, by joining the action, had standing to assert work product immunity). But see *LaRocca v. State Farm Mut. Auto. Ins. Co.*, 47 F.R.D. 278 (W.D. Pa. 1969). In *LaRocca*, the court allowed an attorney to assert work product immunity even though the action for which he had prepared the materials had ended and his client had no interests in the outcome of the present action. "The attorney work product, if privilege it is, is the privilege of the attorney and not that of the client, its rationale is based upon the right of a lawyer to enjoy privacy in the course of preparation of his suit." *Id.* at 282 (quoting *United States v. 38 Cases*, 35 F.R.D. 357, 361 (W.D. Pa. 1964) (citation omitted).

<sup>696</sup> See *supra* notes 691-93 and accompanying text.

<sup>697</sup> See *In re Kaleidoscope, Inc.*, 15 Bankr. 232, 240 (Bankr. N.D. Ga. 1981) ("[I]nterestingly, the Court has been unable to find a reported case which involves a dispute between a client and the client's former counsel over the client's legal files."), *rev'd on other grounds*, 25 Bankr. 729 (N.D. Ga. 1982) (discussed *infra* note 708).

In *In re Kaleidoscope, Inc.*,<sup>698</sup> a trustee in bankruptcy attempted to gain possession of the bankrupt's legal files from the bankrupt's attorney.<sup>699</sup> The trustee wanted to examine the files to determine among other things whether the attorney had charged the debtor reasonable fees.<sup>700</sup> The attorney turned over portions of the file but withheld certain documents, claiming that they were protected from discovery by work product immunity.<sup>701</sup>

The court ordered the attorney to turn over the documents to the trustee, concluding that a client's file was the property of the client<sup>702</sup> and that an attorney could not use work product immunity to deny his client access to files prepared for that client.<sup>703</sup> The court reasoned that because the work product doctrine was designed to protect the interests of both the attorney and his client, neither could assert the doctrine to the exclusion of the other.<sup>704</sup> The court stated further, that an attorney could not, without breaching the fiduciary duty owed his client, claim that work product was produced in "contemplation of litigation" against that client—a prerequisite for asserting work product immunity.<sup>705</sup>

The court in *Kaleidoscope* correctly concluded that, in this particular setting, an attorney should not be able to deny his former client access to his files by asserting work product immunity. As the court properly noted, because an attorney and his client share an interest in work product materials,<sup>706</sup> it would be anomalous to hold that an attorney could use the work product doctrine for his own benefit to the detriment of his client.<sup>707</sup>

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<sup>698</sup> 15 Bankr. 232 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 Bankr. 729 (N.D. Ga. 1982) (discussed *infra* note 708).

<sup>699</sup> *Id.* at 236.

<sup>700</sup> *Id.*

<sup>701</sup> *Id.* at 237.

<sup>702</sup> *Id.* at 241 ("Simply put, the client is entitled to the *entire* file of his attorney, and, on the contrary, the attorney is *not* entitled to refuse to turn over that file or *any* portion thereof.") (emphasis in original).

<sup>703</sup> *Id.* at 242 ("[T]he doctrine of 'work product' has no application to the situation in which a *client* . . . seeks to obtain documents and other tangible things created or amassed by an attorney during the course of that attorney's representation of that client.") (emphasis in original).

<sup>704</sup> *Id.*

<sup>705</sup> *Id.* at 243. The validity of this particular basis for the holding is questionable. Courts have held that work product immunity extends to subsequent litigation totally unrelated to the litigation for which the work product material was prepared. See *In re Murphy*, 560 F.2d 326 (8th Cir. 1977). Thus, the litigation in which the immunity is asserted need not be the one for which it was "contemplated." For a general discussion of the anticipation-of-litigation requirement, see *supra* notes 498-502 and accompanying text.

<sup>706</sup> See *supra* note 692 and accompanying text.

<sup>707</sup> *Kaleidoscope*, 15 Bankr. at 242. A similar circumstance in which an attorney might try to deny his client access to his files arises when the client brings a malpractice action against his attorney. Given the analysis in *Kaleidoscope*, it is unlikely that an attorney would prevail in denying his former client access to his relevant files using the work product doctrine. The

The *Kaleidoscope* court could have reached the same result by employing an alternative method that better addresses the policies behind the work product doctrine—focusing on whether this was an appropriate case for protecting the attorney zone of privacy provided by work product immunity so as to protect the interests of the adversary system.

Extending the zone of privacy to a situation like *Kaleidoscope* would undermine the work product immunity goals of encouraging effective and efficient legal counsel and protecting the vitality of the adversary system. Denying a client access to work product materials prepared for that client would effectively make attorneys unaccountable to their clients. Moreover, applying the protective veil of work product immunity to deny a client the opportunity to scrutinize his attorney's performance would encourage shoddy preparation by attorneys rather than the effective representation the immunity was intended to promote. *Kaleidoscope* presents a situation in which the work product immunity should not apply—where advancing the adversary system and protecting attorney privacy are not compatible.<sup>708</sup>

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attorney would be laboring under the additional disadvantage of trying to cover his allegedly negligent performance of legal services—an act that threatens the adversary system—by asserting work product immunity, which was designed to ensure the vitality and integrity of that very system. See also *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir. 1982) (holding that rule 26(b)(3) and “work product doctrine [do] not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation”).

Applying the “at issue” exception would also preclude an attorney from asserting work product immunity in a legal malpractice action. Because the attorney's work product would inevitably be “at issue” in a malpractice action, the exception would prohibit work product immunity. See generally *supra* notes 424-39, 453-66 and accompanying text.

<sup>708</sup> On appeal, the district court reversed the bankruptcy court's order, which required turnover of legal files to the trustee. *In re Kaleidoscope, Inc.*, 25 Bankr. 729 (N.D. Ga. 1982). Applying the bankruptcy rule of abstention, the district court concluded that, given the substantial state interest in ownership of legal files, the issue would be better resolved by a state court than by the federal bankruptcy court. Although the district court did not address the merits of whether an attorney could assert work product immunity to deny a client access to legal files, it did lay out the policy concerns that a court must address in resolving the question.

At stake is the protection of both a lawyer's right to think and practice freely and the client's right to demand an accounting of the actions of his agent. On the one hand, a lawyer who cannot record freely all of his ideas without fear of later examination by his client may be less likely to consider fully what both lawyer and client should do in particular situations and may therefore provide less-informed or ill-considered representation. Thus, the argument runs, unless the lawyer's recorded thoughts are protected, the lawyer will not provide effective legal services; therefore, to protect the client's interest in effective representation the law must uphold the confidentiality of the lawyer, even to the extent of denying the client access to written evidence of some of the thoughts he has arguably paid for. On the other hand, such a rule presents great potential for abuse, making it far too easy for a lawyer to hide not only his thoughts, but any breach of the fiduciary duties he owes to his client. And, the latter argument continues, the lawyer should not fear the disclosure of thoughts that are not evidence of a breach of duty.

#### 4. *Assertion of Work Product Immunity by the Attorney After His Client Waives the Immunity*

Whether an attorney can continue to assert work product immunity after his client has relinquished or waived his protection is an unresolved question. One court has noted "that the interests of attorneys and those of their clients may not always be the same. To the extent that the interests do not conflict, the attorneys should be entitled to claim privilege even if their clients have relinquished their claims."<sup>709</sup>

Other courts would disagree. For example, in *SEC v. National Student Marketing Corp.*,<sup>710</sup> attorneys and their former client were charged with violations of the securities laws and SEC rules.<sup>711</sup> The SEC sought discovery of certain work product materials to which the client had waived all protections under a judgment of permanent injunction.<sup>712</sup> The attorneys attempted to assert work product immunity independently and thus deny discovery,<sup>713</sup> but the court held that the documents were discoverable.<sup>714</sup> The court acknowledged that the work product doctrine was distinguishable from the attorney-client privilege, in that the latter belongs to the client and is his alone to waive, but nonetheless concluded that where the attorneys themselves were defendants in an action and were charged with questionable behavior, they could not assert work product immunity if the client had waived it.<sup>715</sup>

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*Id.* at 743.

The district court's reversal, thus, was not based on the merits of the bankruptcy court's conclusion that work product immunity should not deny a client access to his files, but rather on the limitations of the bankruptcy court's jurisdictional reach. The bankruptcy courts reasoning is sound and should be followed by courts confronted with this question.

Although *Kaleidoscope* is of value for its discussion of work product immunity where attorney and client interests are in conflict, the court's handling of other related issues highlights some of the complexities of the work product doctrine. In addition to its questionable finding on the "contemplation of litigation" issue, see *supra* note 705, this federal bankruptcy court applied state law rather than rule 26(b)(3) to the initial determination of what constitutes work product materials. 15 Bankr. at 241. Georgia state procedural law limits work product protection to materials that "contain the mental impressions, conclusions, opinions, or legal theories of the person preparing them" and denies protection to the "ordinary" work product protected by rule 26(b)(3). *Id.*

<sup>709</sup> *In re Sealed Case*, 676 F.2d 793, 809 n.56 (D.C. Cir. 1982); see also *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 n.4 (3d Cir. 1979) ("We do not intend any implication that the work product material may be divulged on the client's waiver alone. The concern of the lawyer in maintaining the confidentiality necessary to proper preparation of a case must be recognized.").

<sup>710</sup> 18 Fed. R. Serv. 2d (Callaghan) 1302 (D.D.C. 1974).

<sup>711</sup> *Id.* at 1304.

<sup>712</sup> *Id.* at 1305-06.

<sup>713</sup> *Id.* at 1306.

<sup>714</sup> *Id.* at 1306-07.

<sup>715</sup> *Id.* at 1306.

The Hickman rule, as well as the 1970 amendments to the Federal Rules, cannot be viewed as a means by which attorneys, based solely upon that status, are to be elevated to a preferred position when involved as parties in the litigation process. The sound basis for granting special treatment to attorney

Because of the attorneys' status as codefendants, the probative value of *National Student Marketing Corp.* on the issue of whether a client's waiver of work product immunity denies an attorney standing to assert such immunity is uncertain. Generally, in determining an attorney's right to assert work product immunity after his client has waived protection, a court must decide whether discovery would be detrimental to the adversary system. This question is similar to that faced by a court in determining whether work product materials should be protected in subsequent litigation—whether fear of discovery in subsequent litigation might prompt lawyers to develop poor trial preparation techniques in present litigation.<sup>716</sup> Similarly, placing attorneys on notice that a client's waiver of work product immunity would allow open discovery of work product materials would undermine the work product doctrine's effectiveness in preventing "sharp practices" and inefficient trial preparation. A mere showing that a client no longer retains an interest in work product immunity need not lead to the conclusion that attorney privacy is incompatible with the goals of the adversary system. Ultimately, only a sensitive balancing of the policies behind the work product doctrine and the interests of the particular attorney and client involved will lead to a proper resolution.

5. *Assertion of Work Product Immunity by the Attorney or His Client After One Has Taken Part in Activities that Fall Within the Crime-Fraud Exception*

The courts have held that where an attorney or his client, acting without the knowledge of the other, is involved in crime, fraud, or other unfair dealings that trigger an exception to work product immunity,<sup>717</sup> the nonwrongdoing party may still benefit from the immunity.<sup>718</sup>

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"work-product" is the realization that, in appropriate circumstances, the adversary system of justice requires that certain activities of attorneys be sheltered from discovery. It would be difficult for [the attorneys here] to now posit their reliance upon theories of work product in terms of serving or protecting the rights of a former client and codefendant who no longer has any interest in this . . . action.

*Id.*

<sup>716</sup> See *supra* notes 598-603 and accompanying text.

<sup>717</sup> For a general discussion of the crime-fraud exception see *supra* notes 440-66 and accompanying text.

<sup>718</sup> See *In re Sealed Case*, 676 F.2d at 812 n.75.

[S]ince the work product privilege belongs to the lawyer as well as the client in some situations an attorney may be able to claim the privilege even though he or she was consulted in furtherance of the client's crime or fraud. But there is no need to accord a guilty client standing to assert the claims of its innocent attorney.

*Id.* (citations omitted).

In *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980), the court held that where a client participated in fraud without the knowledge of his attorney, the client had to relinquish the benefit he would have gained from the work product doctrine. "[H]owever,

In *Moody v. IRS*,<sup>719</sup> the attorney for the IRS met with the presiding judge without notice to opposing counsel.<sup>720</sup> Moody's attorney sought discovery of a memorandum that the IRS attorney had prepared concerning the meeting.<sup>721</sup> In evaluating the IRS claim that the memorandum was protected by the work product doctrine, the court stated:

It would indeed be perverse . . . to allow a lawyer to claim an evidentiary privilege to prevent disclosure of work product generated by those very activities the privilege was meant to prevent. Non-disclosure would then provide an incentive for, rather than against, the disfavored practices. The integrity of the adversary process is not furthered by protecting a lawyer who steps outside his role as "an officer of the court . . . work[ing] for the advancement of justice while faithfully protecting the rightful interests of his clients." An attorney should not be able to exploit the privilege for ends outside of and antithetical to the adversary system any more than a client who attempts to use the privilege to advance criminal or fraudulent ends.<sup>722</sup>

Nonetheless, the court concluded that the client also had interests in nondisclosure of work product materials that had to be considered in determining whether discovery was proper:

[T]he client's interest in preventing disclosures about his case may survive the misfortune of his representation by an unscrupulous attorney. A court must look to all the circumstances of the case . . . to decide whether the policy favoring disclosure outweighs the client's legitimate interest in secrecy. No court should order disclosure . . . in discovery if the disclosure would traumatize the adversary process more than the underlying legal misbehavior.<sup>723</sup>

The court ultimately remanded the case for further proceedings.<sup>724</sup>

The D.C. Circuit's opinion in *Moody* illustrates the kind of balancing of attorneys' and clients' interests with the policies of the work product doctrine that is necessary to ensure a healthy adversary system. No application of wooden rules to determine where an attorney's claim to work product immunity ends and where his client's begins can lead to satisfactory results. Where only one is guilty of wrongdoing, a ruling that both must automatically lose work product protection fails to acknowledge the rightful interest that each has in the protection.

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the attorney's mental impressions, conclusions, opinions, and legal theories must still be protected in order to avoid an invasion of the attorney's necessary privacy in his work, an invasion not justified by the misfortune of representing a fraudulent client." *Id.* at 63.

<sup>719</sup> 654 F.2d 795 (D.C. Cir. 1981).

<sup>720</sup> *Id.* at 799.

<sup>721</sup> *Id.*

<sup>722</sup> *Id.* at 800 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)) (footnotes omitted).

<sup>723</sup> *Id.* at 801 (footnotes omitted).

<sup>724</sup> *Id.* at 801.



6. *Standing of a Party to Assert Work Product Immunity Over Materials in the Hands of a Nonparty*

In addition to the individual rights of attorneys and clients to assert work product immunity, a party seeking work product immunity for documents in the hands of a nonparty may encounter a problem with standing. Under the Federal Rules of Civil Procedure, this issue is likely to arise in a number of situations. For example, a party to an action takes the statement of a nonparty witness. The statement includes questions asked the witness by the party's attorney and is therefore work product protected under rule 26(b)(3). Under rule 45(b),<sup>725</sup> which applies to both parties and nonparties, the party's adversary subpoenas the witness to produce a copy of his statement. Rule 45(b) forces the witness to produce all properly requested documents within his control. Because the witness has a right under rule 26(b)(3) to obtain a copy of his own statement from the party,<sup>726</sup> he is technically in control of the document and could be required to turn it over to the party's adversary. The adversary thus accomplishes indirectly what he could not do directly—he obtains his opponent's work product without any showing of need as required by rule 26(b)(3).

Such circumvention of the work product doctrine would be intolerable. Accordingly, courts have held that “a party may raise objections [in order to quash a subpoena directed to a nonparty] in situations where the party claims some personal right or privilege relating to the documents sought.”<sup>727</sup> Included within this “right or privilege” is the right to claim work product immunity.<sup>728</sup> Thus, a party could avoid

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<sup>725</sup> Federal Rule of Civil Procedure 45(b) provides in pertinent part:

A subpoena may . . . command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive. . . .

<sup>726</sup> Federal Rule of Civil Procedure 26(b)(3) provides in pertinent part: “Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person.”

<sup>727</sup> *Oliver B. Cannon & Son, Inc. v. Fidelity & Cas. Co.*, 519 F. Supp. 668, 680 (D. Del. 1981) (citing *Norris Mfg. Co. v. R.E. Darling Co.*, 29 F.R.D. 1 (D. Md. 1961), which allowed work product immunity to be asserted in such a situation, and 8 C. WRIGHT & A. MILLER, *supra* note 2, at § 2457); *see also* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2457, at 431 (“Ordinarily a party has no standing to seek to quash a subpoena to one who is not a party unless the party claims some personal right or privilege with regard to the documents sought.”) (footnotes omitted); *Dart Indus., Inc. v. Liquid Nitrogen Processing Corp.*, 50 F.R.D. 286, 291 (D. Del. 1970) (dictum: If “a party to an action can make claim to some personal right or privilege in respect to subject matter of a subpoena duces tecum directed to a nonparty witness, the party to the action . . . has right to relief under Rule 45(b) or 30(b).”) (quoting *Shepherd v. Castle*, 20 F.R.D. 184, 188 (W.D. Mo. 1957)).

<sup>728</sup> *See Norris Mfg. Co. v. R.E. Darling Co.*, 29 F.R.D. 1 (D. Md. 1961). In *Norris*, the plaintiff served notice under rule 30 that it would take depositions of three private investigators employed by the defendant or the defendant's attorney, and that it had caused “to be

disclosure of work product materials in the above situation by moving to quash the subpoena as "unreasonable" under rule 45(b).<sup>729</sup>

### 7. Conclusion

Who can assert work product immunity cannot be determined through the application of rigid rules. Categorizing the situations in which the issue of standing may arise, however, can provide guidelines that minimize the uncertainty. First, an attorney whose interests conflict with those of his client generally will fail in any attempt to withhold work product from his client under a claim of work product immunity. Second, where a waiver of, or exception to, the protection is involved, only a careful balancing of the separate interests of attorney and client and the overall policies of the work product doctrine will lead to a correct result. Finally, a party who produces work product materials that end up in the hands of a nonparty has standing to assert work product immunity to prevent their disclosure to his adversary.

### C. Waiver of Work Product Immunity

As discussed above,<sup>730</sup> when an attorney and his client do not share common interests, either may continue to assert work product immunity despite the other's waiver. The question arises, however, as to what disclosures or uses of work product materials actually lead to a waiver of immunity. Both *Hickman v. Taylor*<sup>731</sup> and rule 26(b)(3) failed to address this issue and the resulting litigation and commentary has been significant, although far from conclusive. Thus, the practicing attorney and his client have little guidance as to what will constitute waiver of work product immunity. This section will first examine the relevant policies behind work product immunity and the attempts by courts and commentators to resolve the waiver issue. Means of limiting uncertainty as regards waiver will then be proposed.

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issued subpoenas duces tecum addressed to the witnesses requiring them to bring to the deposition all reports and other writings associated with the investigations of plaintiff's agents, servants and employees in connection with the litigation." *Id.* at 1. The defendant claimed that because the investigators worked at the behest of the defendant's attorney, the results of their investigations were attorney's work product and therefore protected, subject to a proper showing of need. The court agreed and held that "[w]here a party to the action claims privilege, as defendant does in this case, he has standing to claim relief under Rule 45(b) or Rule 30(b), as well as the witness." *Id.* at 2 (citation omitted).

<sup>729</sup> In the case where a subpoena to produce documents is issued under rule 30(b) (relating to taking of depositions) the proper remedy to prevent disclosure of work product held by a nonparty is a motion for a protective order under rule 26(c). *See* 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2035, at 261 ("[Under rule 26(c)] a party may seek an order if he believes his own interest is jeopardized by discovery sought from a third person.") (citing *Norris Mfg. Co. v. R.E. Darling Co.*, 29 F.R.D. 1 (D. Md. 1961)).

<sup>730</sup> *See supra* notes 709-15 and accompanying text.

<sup>731</sup> 329 U.S. 495 (1947).

1. *Policy of the Work Product Doctrine with Regard to Waiver*

The basic purpose of the work product doctrine is to protect the integrity and vitality of the adversary system.<sup>732</sup> Work product immunity accomplishes this by providing the attorney with a zone of privacy so that he can prepare his client's case to the fullest extent possible, free from exposure to his adversary.<sup>733</sup> When assured that his efforts will be safeguarded from the potentially debilitating effects of disclosure to his adversary, the attorney is free to prepare his client's case more vigorously.<sup>734</sup> This, in turn, maximizes the amount of relevant information available to the fact-finder. The immunity of work product materials from discovery "rests on the belief that such promotion of adversary preparation ultimately furthers the truth-finding process."<sup>735</sup>

a. *Comparison of Policies Underlying Work Product Immunity and Attorney-Client Privilege and Their Differing Waiver Standards.* Where waiver of work product immunity is at issue in a proceeding, waiver of the attorney-client privilege is usually at issue as well.<sup>736</sup> Both involve disclosure to third parties: the former is concerned with revelation of work product materials to an opponent; the latter with dissemination of confidential information to the world.<sup>737</sup> In formulating standards for waiver of attorney-client privilege and work product immunity, some courts have failed to distinguish the policy rationales behind the two doctrines. This has resulted in waiver of work product immunity for materials that should have remained protected.<sup>738</sup> Therefore, a brief discussion of the standard for waiver of the attorney-client privilege will help lay a foundation for a review of the standards courts have established for waiver of work product immunity.

The primary aim of the attorney-client privilege is to protect the relationship of an attorney with his client.<sup>739</sup> This is accomplished by assuring confidentiality of communication between attorney and client, which in turn fosters candor in their relationship.<sup>740</sup> If an attorney is to thoroughly prepare his client's case, the client must feel free to disclose

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<sup>732</sup> See *Hickman v. Taylor*, 329 U.S. at 511; *In re Sealed Case*, 676 F.2d at 809. See generally *supra* notes 102-27 and accompanying text.

<sup>733</sup> See *Hickman*, 329 U.S. at 510-11; *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). See generally *supra* notes 163-68, 174-75 and accompanying text.

<sup>734</sup> See *Developments, supra* note 2, at 1028-29.

<sup>735</sup> *United States v. AT&T*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) (emphasis in original).

<sup>736</sup> See, e.g., *In re Sealed Case*, 676 F.2d at 809, 818, 824; *United States v. AT&T*, 642 F.2d 1285, 1299-300 (D.C. Cir. 1980); *Transamerica Computer Co. v. IBM*, 573 F.2d 646, 647 n.1 (9th Cir. 1978).

<sup>737</sup> See 8 C. WRIGHT & A. MILLER, *supra* note 2, § 2024, at 209-10.

<sup>738</sup> See *id.*; see also *infra* notes 771-72.

<sup>739</sup> See *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

<sup>740</sup> See *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982).

all that he knows to the attorney without fear of communication to the outside world.<sup>741</sup> Presumably, unless complete secrecy exists, the client will not communicate certain facts to his attorney.

Because the attorney-client privilege is designed to elicit communications that will be made only in secrecy, however, there is no justification for the privilege when the client does not intend the communication to be confidential.<sup>742</sup> In such a circumstance, society's countervailing interest in unlimited inquiry into relevant facts prevails.<sup>743</sup> Thus, courts and commentators agree that voluntary disclosure of such communications will waive the privilege.<sup>744</sup>

The policies underlying work product immunity are fundamentally different from those underlying the attorney-client privilege.<sup>745</sup> The work product doctrine "stands in contrast to the attorney-client privilege; rather than protecting confidential communications from the client, it provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories."<sup>746</sup> The scope of work product immunity's protection is far broader than that of the attorney-client privilege. Work product immunity does not merely protect the confidentiality of communication, it seeks to protect the very integrity of the adversary

<sup>741</sup> See *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980); see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.").

<sup>742</sup> See Note, *Work Product Doctrine Protects Client's Mental Impressions*, 15 STAN. L. REV. 718, 719 (1963).

<sup>743</sup> See *Herbert v. Lando*, 441 U.S. 153, 175 (1979):

Evidentiary privileges in litigation are not favored. . . . As we stated [in *United States v. Nixon*, 418 U.S. 683, 710 (1974)] in referring to existing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

<sup>744</sup> See *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); 8 C. WRIGHT & A. MILLER, *supra* note 2, at 209-10; Note, *Waiver of the Work Product Immunity*, 1981 U. ILL. L. REV. 953, 964 (1981); *Developments, supra* note 2, at 1044-45.

<sup>745</sup> See *Hickman v. Taylor*, 329 U.S. 495, 508, 509-12 (1947); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Ceco Steel Prods. Corp. v. H.K. Porter Co.*, 31 F.R.D. 142, 143 (N.D. Ill. 1962); *Connecticut Mut. Life Ins. Co. v. Shields*, 16 F.R.D. 5, 8 (S.D.N.Y. 1954):

[The] argument [for waiver] seems to be that the work product rule and the attorney-client privilege are bottomed on the same considerations and the protection each affords is subject to the same infirmity. Any such confusion was dispelled by *Hickman v. Taylor*, which determined the right to discovery of the work product of an attorney apart from considerations of attorney-client privilege.

see also *supra* note 38.

<sup>746</sup> *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980); see *Hickman v. Talyor*, 329 U.S. 495, 510 (1947).

system.<sup>747</sup>

Furthermore, unlike the attorney-client privilege, the work product doctrine achieves its purposes by preventing disclosure to an opposing party<sup>748</sup> rather than by preventing disclosure to the outside world generally. Disclosure of work product materials to third persons does not create inherent inconsistency with the policies behind the work product doctrine, as it does in the case of the attorney-client privilege, and such disclosure does not necessitate waiver of the immunity.<sup>749</sup> To the contrary, because disclosure to third parties will often strengthen a client's case, it supports the policy of protecting the vitality of the adversary system by allowing an attorney to prepare thoroughly without fear of discovery by an adversary.<sup>750</sup>

The work product doctrine also differs significantly from the attorney-client privilege in that the former is qualified<sup>751</sup> while the latter is nearly absolute. A court may use waiver as a limiting device on the attorney-client privilege to allow discovery where extreme hardship is placed on a party because the privilege protects material essential to the proper adjudication of an issue. Rule 26(b)(3), on the other hand, expressly allows discovery of work product materials "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>752</sup> This statutory limitation thus decreases the need to use waiver as a means to prevent inherent unfairness where work product materials are involved.<sup>753</sup>

The final difference between the standards of waiver for work product immunity and the attorney-client privilege rests on the intent of the party who has made disclosures to a third party. In the case of the attor-

<sup>747</sup> See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *In re International Systems & Controls Corp. Sec. Litig.*, 91 F.R.D. 552, 556 (S.D. Tex. 1981) ("primary purpose [of work product immunity] is not so much the protection of the confidentiality of the communication, but the integrity of the adversarial system"), *vacated on other grounds*, 693 F.2d 1235 (5th Cir. 1982); 8 C. WRIGHT & A. MILLER, *supra* note 2, at 209-10.

<sup>748</sup> *United States v. AT&T*, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980); *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51 (S.D.N.Y. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 2, at 209-10.

<sup>749</sup> *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982).

The work product privilege protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share. And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party.

*Id.* at 809 (footnotes omitted).

<sup>750</sup> See Note, *supra* note 742, at 724.

<sup>751</sup> See *Moody v. IRS*, 654 F.2d 795, 798 n.10 (D.C. Cir. 1981); *supra* notes 230-40 and accompanying text.

<sup>752</sup> FED. R. CIV. P. 26(b)(3).

<sup>753</sup> See *Developments*, *supra* note 2, at 1045.

ney-client privilege, when a client discloses the otherwise privileged information to third persons his intent is no longer to ensure confidentiality and the privilege is waived.<sup>754</sup> In contrast, work product immunity protects against disclosure to a party's adversary. Disclosure to third persons in no way indicates a party's intent to allow his adversary access to work product materials; waiver is therefore not warranted.<sup>755</sup> In discussing waiver of the attorney-client privilege, however, Dean Wigmore suggests that a party's intent, implied or otherwise, is insufficient to determine whether waiver has occurred.

[R]egard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.<sup>756</sup>

This test also has been applied to waiver of work product immunity.<sup>757</sup> Thus, where a party can show that his opponent's selective disclosure of work product materials has created some inherent unfairness, perhaps the courts should find a waiver.<sup>758</sup>

b. *United States v. Nobles: Testimonial Use of Work Product Materials Leads to Waiver of Protection.* As discussed above, the courts in recent years have expanded the application of work product immunity to areas

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<sup>754</sup> See *supra* notes 739-44 and accompanying text.

<sup>755</sup> See *supra* notes 745-50 and accompanying text.

<sup>756</sup> 8 J. WIGMORE, *supra* note 35, § 2327, at 636.

<sup>757</sup> *In re Sealed Case*, 676 F.2d 793, 817-18 (D.C. Cir. 1982).

<sup>758</sup> The authors have not found any reported cases in the civil discovery setting where a waiver has been held because of unfairness created by selective disclosure of work product materials. This is not surprising, however. In keeping with their roles as advocates, attorneys invariably make such disclosures of work product materials to strengthen their client's position. An adversary will be hard-pressed to maintain that an opponent's action worked an unfairness merely because that action strengthened his opponent's case. Indeed, this is precisely what the Court in *Hickman* had in mind in creating a "zone of privacy" for attorneys so that they could prepare for trial in the most effective manner possible. See *supra* notes 733-35 and accompanying text.

On the other hand, where testimonial use is made of work product materials, the courts have more readily held that work product immunity is waived. See *infra* notes 762-63 and accompanying text. Given Dean Wigmore's emphasis on the use of evidence at trial, it is likely that in proposing his waiver standard, he was more concerned with the potential unfairness created by selective disclosures at trial through testimonial use of privileged materials. See 8 J. WIGMORE, *supra* note 35, § 2327; see also *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (waiver of work product immunity in grand jury proceedings where party seeking to deny disclosure of work product documents had previously participated in SEC's voluntary disclosure program and had selectively withheld certain documents in violation of commitment to full disclosure).

other than civil discovery.<sup>759</sup> This has extended the *Hickman* doctrine from the realm of immunity from civil discovery to that of evidentiary privilege.<sup>760</sup> The result has been a highly questionable inference by some courts that because work product immunity becomes a waivable evidentiary privilege when testimonial use is made of protected materials, it is also readily waivable in the civil discovery setting.<sup>761</sup>

The case that has had the most substantial effect on the waiver doctrine is *United States v. Nobles*.<sup>762</sup> In *Nobles*, counsel for a criminal defendant sought to impeach the credibility of prosecution witnesses by testimony of a defense investigator regarding statements he had previously obtained from the witnesses. The Court held that "where . . . counsel attempts to make a testimonial use of [work product] materials the normal rules of evidence come into play with respect to cross-examination and production of documents," requiring a waiver.<sup>763</sup>

Some courts, attempting to interpret the bounds of *Nobles*, have cited it for allowing waiver of work product generally;<sup>764</sup> others have

<sup>759</sup> See *supra* notes 674-84 and accompanying text.

<sup>760</sup> See *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

The cases extending the *Hickman* doctrine into the realm of privilege have . . . applied the basic concepts of exception and waiver to the new privilege. This adaptation of the *Hickman* doctrine to the law of privileges is required, not by the inner logic of the work product doctrine alone, but primarily by a structural logic—courts should not frustrate the efforts of a grand jury unless the purpose as well as the letter of the privilege requires it.

*Id.* at 810-11 (footnotes omitted).

<sup>761</sup> See *infra* notes 764-69 and accompanying text.

<sup>762</sup> 422 U.S. 225 (1975).

<sup>763</sup> *Id.* at 239 n.14.

The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony.

*Id.* at 239 (footnotes omitted).

Other courts also have held that waiver of work product "privilege" occurs where testimonial use is made of work product materials. See *Chavis v. North Carolina*, 637 F.2d 213, 223-24 (4th Cir. 1980) (prosecutor in criminal action waived work product privilege by calling certain witness); *United States v. Salsedo*, 607 F.2d 318, 320-21 (9th Cir. 1979) (defense counsel in criminal action waived work product protection for materials he used to cross-examine witness); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 146 (D. Del. 1982) (Federal Rule of Evidence 612 requires disclosure to adversary of all work product materials, even if they constitute opinion work product used to refresh witness's memory prior to taking of deposition by adversary). But see *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779 (S.D.N.Y. 1982) (in similar fact pattern to *James Julian*, production order of any writings that reflect solely attorney's mental processes is improper unless judge finds adverse party would be hampered in testing accuracy of witness's testimony); see also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977) (indicating that in future cases court would require disclosure under Federal Rule of Evidence 612 where work product materials are used to refresh witness's memory).

<sup>764</sup> See, e.g., *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446 (W.D. Mo. 1976).

attempted to limit it to waiver only where testimonial use of work product is involved.<sup>765</sup> These latter courts have held that *Nobles* does not apply to waiver of work product materials protected under rule 26(b)(3) where a party has made a partial or inadvertent disclosure of such materials.<sup>766</sup>

Limiting *Nobles* to waiver of work product immunity only where testimonial use of work product materials is involved better satisfies the policy of protecting the adversary system. Application of the rules of evidence regarding waiver to testimonial use of work product materials is a logical consequence of the extension of the *Hickman* doctrine into the realm of evidentiary privilege.<sup>767</sup> It does not follow, however, that any basis exists for applying those principles of waiver to pretrial civil discovery. Whereas it would be patently unfair to allow an attorney to use work product materials to refresh a witness's memory of the facts and then deny his opponent access to those materials to effectively cross-examine the witness,<sup>768</sup> it is less clear that any inherent unfairness results from an attorney's disclosure of work product materials to third parties in order to strengthen his client's case.<sup>769</sup>

## 2. *Formulations of the Courts and Commentators as to When Disclosure of Work Product in Civil Discovery Will Constitute Waiver*

The question of waiver exists whenever a party discloses his work product to third parties and then seeks to assert work product immunity against an adversary. In determining whether a party has waived work product immunity, a majority of courts follow the rule "that disclosure of a document to third persons does not waive the work product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information."<sup>770</sup> Some courts have held that any disclosure to a nonparty will waive the work product immunity,<sup>771</sup> but these courts have been criticized for confusing work product immu-

<sup>765</sup> See, e.g., *In re Murphy*, 560 F.2d 326, 339 n.24 (8th Cir. 1977).

<sup>766</sup> E.g., *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222-23 (4th Cir. 1976).

<sup>767</sup> See *supra* note 760.

<sup>768</sup> See *supra* note 763.

<sup>769</sup> See *supra* note 758.

<sup>770</sup> 8 C. WRIGHT & A. MILLER, *supra* note 2, at 210; see *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 89 (E.D.N.Y. 1981); *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51 (S.D.N.Y. 1979); *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446 (W.D. Mo. 1976); *Developments, supra* note 2, at 1045.

<sup>771</sup> See, e.g., *B & C Trucking Co. v. Holmes & Narver, Inc.*, 39 F.R.D. 317, 319 (D. Hawaii 1966) (mere voluntary disclosure of work product materials by defendant constituted waiver of work product immunity); *D'Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610 (S.D.N.Y. 1965) (voluntary disclosure of work product materials by attorney to Antitrust Division of Department of Justice, not party to action, constituted waiver).



nity with attorney-client privilege.<sup>772</sup>

The question of waiver of work product immunity in civil discovery usually arises where a party previously has made voluntary disclosures in government antitrust investigations<sup>773</sup> or to the Securities and Exchange Commission.<sup>774</sup> In *United States v. AT&T*,<sup>775</sup> MCI, a nonparty to an antitrust action brought by the government against AT&T, sought to intervene<sup>776</sup> to assert work product immunity over documents that it had previously disclosed to the government. The court order allowing MCI to turn over the documents to the government had included a strict confidentiality provision permitting the government to use the material only in its litigation against AT&T. MCI, however, had also filed a separate antitrust action against AT&T and was concerned with AT&T's ability to discover these documents.

The district court denied MCI the right to intervene for the sole purpose of asserting work product immunity and held that, in any event, MCI had waived work product immunity by disclosing the documents in question to the government.<sup>777</sup> The D.C. Circuit reversed on both issues, holding that MCI could intervene as of right for the limited purpose of asserting work product immunity,<sup>778</sup> and that MCI had not waived work product immunity by disclosing the documents to the government.<sup>779</sup>

In holding that MCI's disclosure to the government did not constitute waiver<sup>780</sup> the court applied what is essentially a corollary of the

<sup>772</sup> See 8 C. WRIGHT & A. MILLER, *supra* note 2, at 209-10; *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 338 (S.D.N.Y. 1969).

<sup>773</sup> See, e.g., *United States v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980); Note, *supra* note 104, at 954 n.16.

<sup>774</sup> See, e.g., *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *In re International Systems & Controls Sec. Litig.*, 91 F.R.D. 552 (S.D. Tex. 1981), *vacated on other grounds*, 693 F.2d 1235 (5th Cir. 1982).

<sup>775</sup> 642 F.2d 1285 (D.C. Cir. 1980).

<sup>776</sup> The D.C. Circuit ultimately held in *AT&T* that MCI under Federal Rule of Civil Procedure 24(a)(2) had a valid claim for intervention as of right to assert work product immunity. *Id.* at 1291-95. Although the court correctly allowed MCI to intervene, use of intervention to protect work product materials generally does not produce judicial economy. Where no waiver has occurred, a more efficient means of protecting work product that has been disclosed to a third party is to allow that third party to assert the immunity for the attorney who prepared the materials. See *Developments, supra* note 2, at 1045:

To afford adequate protection, it seems necessary to allow the work-product privilege to be asserted by the other attorney. Otherwise an adversary could obtain trial-preparation material indirectly through the temporary custodian of the material although unable to do so directly from the attorney who prepared it.

See also *In re Grand Jury Empanelled* (Hughes), 633 F.2d 282, 286 (3d Cir. 1980) (attorney may intervene in criminal proceeding to protect work product of his investigator).

<sup>777</sup> 642 F.2d at 1290.

<sup>778</sup> *Id.* at 1295; see also *supra* note 776.

<sup>779</sup> *Id.* at 1299-1300.

<sup>780</sup> *Id.* at 1299.

majority rule;<sup>781</sup> the "common interests" test.<sup>782</sup> Because MCI and the government anticipated litigation against a common adversary, AT&T, they had a strong common interest in sharing the fruits of their efforts to make trial preparation more efficient.<sup>783</sup> Parties such as MCI and the government that share common interests against a common adversary are unlikely to disclose work product material to an adversary.<sup>784</sup> The disclosure of such materials, therefore, does not increase the likelihood that the adversary will obtain the information, and should not constitute waiver.<sup>785</sup> This is particularly true where the disclosures are made with a guarantee of confidentiality.<sup>786</sup>

The majority rule, and its common interests corollary, comport well with the work product doctrine's purpose of preventing disclosure to adversaries in litigation but not to the world in general.<sup>787</sup> The majority rule encourages an attorney to prepare more fully for trial without fear of access by adversaries, even when circumstances necessitate disclosure of work product materials to third parties.<sup>788</sup> The questions remain, however, whether the rule goes far enough in protecting the interests of the work product doctrine and whether countervailing interests ever exist that justify the need for waiver of the immunity as a result of disclosure to a third party.<sup>789</sup>

### 3. *A Suggested Formulation: Disclosure of Work Product Materials Should Never Lead to Waiver*

The most effective way to remove the uncertainty that waiver brings to work product immunity<sup>790</sup> is simply not to apply the waiver

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<sup>781</sup> See *supra* note 770 and accompanying text.

<sup>782</sup> 642 F.2d at 1299-300. The court explained, "[s]o long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts." *Id.* at 1299; see also *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 338 (S.D.N.Y. 1969); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 555 (N.D. Ill. 1964).

<sup>783</sup> *AT&T*, 642 F.2d at 1299-1300.

<sup>784</sup> *Id.*

<sup>785</sup> *Id.*

<sup>786</sup> *Id.*

<sup>787</sup> See *supra* notes 745-50 and accompanying text.

<sup>788</sup> *AT&T*, 642 F.2d at 1300.

<sup>789</sup> See *infra* notes 791-804 and accompanying text.

<sup>790</sup> Courts and commentators are in almost total agreement upon two aspects of waiver. First, where a court compels disclosure, no waiver will occur. See, e.g., *In re Grand Jury Investigation (Ocean Transp.)*, 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979); *Transamerica Computer Co. v. IBM*, 573 F.2d 646, 651-52 (9th Cir. 1978); *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 604 n.1 (8th Cir. 1977). Second, no waiver occurs if the disclosure is made inadvertently; disclosure must be made knowingly. See, e.g., *Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978) (no waiver where IBM disclosed work product materials inadvertently as result of accelerated discovery ordered by court); see also *Cooper*, *supra* note 129, at 1300 n.100 ("Since the policies behind the protection against discovery are different from the policies behind the attorney-client privilege, it should be clear

theory in civil discovery where a party discloses work product materials. In a case where a party makes testimonial use of work product materials,<sup>791</sup> a court would still hold that the party has waived protection of the documents involved, but only as to an evidentiary privilege, not as to work product immunity.<sup>792</sup> The distinction is significant. The inherent unfairness associated with "testimonial use" of privileged materials that necessitates waiver of evidentiary privilege is not present when disclosures are made to third parties in the course of trial preparation.<sup>793</sup> Calling such a waiver of an evidentiary privilege a waiver of work product immunity is a misnomer.

Waiver is also inappropriate in the extreme situation where a party intends to make an unrestricted disclosure of work product materials to his adversary, an act totally inconsistent with the policies underlying work product immunity. Once an adversary has acquired such materials, there is little that the disclosing party could hope to protect by asserting the immunity.<sup>794</sup>

This proposal to discard the waiver theory in civil discovery is consistent with the holdings of courts and the conclusions of commenta-

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that waiver should not be found except in clear circumstances of *actual intention* that an adversary may see the material involved.") (emphasis added).

<sup>791</sup> See, e.g., *United States v. Nobles*, 422 U.S. 225 (1975); *supra* note 763 and accompanying text.

<sup>792</sup> See *supra* notes 761-69 and accompanying text.

<sup>793</sup> *Id.*; cf. *In re Subpoenas to Fulbright & Jaworski*, 52 U.S.L.W. 2201 (D.D.C. Sept. 23, 1983) (corporation's disclosure of documents as part of SEC's voluntary disclosure program in attempt to avoid formal investigation and litigation was "testimonial use" and therefore constituted waiver of work product immunity in subsequent action in which shareholders sought discovery of documents).

<sup>794</sup> But see Note, *supra* note 744, at 968 (suggesting waiver occurs only where actual disclosure is made to adversary by attorney attempting to protect his work product or by anyone to whom attorney has disclosed).

tors.<sup>795</sup> Courts following the majority rule,<sup>796</sup> and properly considering the policies behind work product immunity, never find waiver.<sup>797</sup> This result is not surprising given the majority rule "that disclosure of a document to third persons does not waive the work product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information."<sup>798</sup> To whom would an attorney disclose his work product materials if such disclosure would "substantially increase" his adversary's opportunity to acquire the information? One is hard-pressed to come up with a single instance in which such a disclosure would be in an attorney's interest.

Thus, courts have implicitly acknowledged what is suggested here: short of disclosure to an adversary, nothing inherent in *any* disclosure of work product materials undermines the policies behind the work product doctrine and justifies its waiver.<sup>799</sup> Dean Wigmore suggests that even if no intent to waive protection of materials exists, a court should find a waiver where disclosure of such materials leads to inconsistency or unfairness.<sup>800</sup> Because the purpose of work product immunity is limited to preventing disclosure to a party's adversary, there is no inconsistency where disclosure is made to a third party. Indeed, to the extent that such disclosure strengthens a party's case, it supports the *Hickman* policy of

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<sup>795</sup> In the interest of the best possible adversary preparation of a case, it would seem that work product protection should not be waived by any communication made with the reasonable expectancy of strengthening the case. Any communication made to a codefendant, a potential codefendant, or one engaged with the attorney in the preparation of the case should perhaps be presumed to have been made with such a purpose, and a communication made even to one with no foreseeable interest in the outcome of the case could often be justified as having been made with such a reasonable hope of leading to a stronger case. It is, therefore, only in the unusual instance of an inexplicable and pointless communication of work product that a waiver should, perhaps, be found.

Note, *supra* note 742, at 724. Professor Gardner suggests, however, that disclosure to any other party or his counsel always should constitute waiver, and that disclosure to a third party would ordinarily constitute a waiver, unless accomplished to improve the position of the original party and the third party could not produce the materials if called upon to do so. Gardner, *supra* note 134, at 288-97. Professor Gardner's theory is premised on the assumption that the party seeking discovery, in any event, could make discovery from the party to whom the documents had been disclosed. Such a person could not assert work product immunity, and, therefore, discovery should be allowed from the party that produced the documents and allowed their disclosure. Professor Gardner's article fails to take into account, however, the rights of both the lawyer who produced the documents, and the party to whom those documents were transferred, to intervene and assert work product immunity. See *supra* note 776.

<sup>796</sup> See *supra* note 770 and accompanying text.

<sup>797</sup> See 8 C. WRIGHT & A. MILLER, *supra* note 2, at 210; see, e.g., *United States v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980); *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334 (S.D.N.Y. 1969); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551 (N.D. Ill. 1964).

<sup>798</sup> 8 C. WRIGHT & A. MILLER, *supra* note 2, at 210.

<sup>799</sup> See *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("The purposes of the work product privilege are . . . not inconsistent with selective disclosure—even in some circumstances to an adversary.").

<sup>800</sup> See *supra* note 756 and accompanying text.

ensuring the vitality of the adversary system by allowing an attorney to prepare thoroughly for trial.<sup>801</sup>

Similarly, because work product immunity provides only a qualified protection for trial preparation materials, claims of unfairness resulting from disclosure of work product materials to third parties are minimized.<sup>802</sup> Even without waiver as a weapon to force discovery, a showing of substantial need or undue hardship under rule 26(b)(3) leads to disclosure of an adversary's documents.<sup>803</sup> Along this line of thought, some early cases discussing waiver of work product immunity held that disclosure of materials to third parties was relevant to the question of work product discovery only to the extent that the party seeking discovery could show that such disclosure had caused him undue hardship and could contribute to a showing of "good cause."<sup>804</sup> This is perhaps the best way to deal with the issue of unfair disclosures to third parties without applying the waiver theory but remaining consistent with the policies behind the doctrine: A party may prove "undue hardship" if he can show that disclosures of work product by his adversary have created unfairness.

In addition to the above considerations, the waiver theory also leads to costly and wasteful litigation and undermines the effectiveness of work product immunity in promoting the adversary system. The potential benefit to be derived from discovery of an opponent's work product is such that a party may attempt to make a waiver argument even when he knows his chances for success are minimal. Courts, however, after lengthy and costly deliberation almost invariably hold that disclosure of work product materials does not lead to waiver.<sup>805</sup>

The waiver theory when applied to the work product doctrine may also have a "chilling effect" on practicing attorneys. An attorney, for example, may be dissuaded from disclosing work product documents to a fellow practitioner or a coparty if even a minimal possibility exists that such disclosure might be termed a waiver.<sup>806</sup> Thus, waiver undermines one of the primary aims of the work product doctrine, providing an attorney necessary working room to prepare his client's case thoroughly.<sup>807</sup>

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<sup>801</sup> See *supra* notes 745-50 and accompanying text.

<sup>802</sup> See *supra* notes 751-53 and accompanying text.

<sup>803</sup> See *id.* The doctrine of exception may also be applied in appropriate circumstances by a party seeking discovery of work product materials. See *supra* notes 424-66 and accompanying text.

<sup>804</sup> See *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960); *Vilastor-Kent Theatre Corp. v. Brandt*, 19 F.R.D. 522 (S.D.N.Y. 1956); *Connecticut Mut. Life Ins. Co. v. Shields*, 16 F.R.D. 5 (S.D.N.Y. 1954).

<sup>805</sup> See *supra* note 797 and accompanying text.

<sup>806</sup> This would seem to be especially true of solo practitioners who lack substantial resources and must depend upon disclosure of work product to fellow practitioners in preparing for litigation.

<sup>807</sup> See *supra* notes 732-35 and accompanying text.

Moreover, the application of waiver has led to some questionable and potentially far-reaching results.<sup>808</sup> One recent case, for example, has created uncertainty about the effect of work product disclosure during negotiations. In *Grumman Aerospace Corp. v. Titanium Metals Corp.*,<sup>809</sup> the court held that disclosure of work product to an adversary during settlement negotiations waived work product immunity as to all subsequent adversaries.<sup>810</sup> Purporting to follow the majority rule on waiver,<sup>811</sup> the court stated that "[d]isclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement."<sup>812</sup> The fact that an adversary not privy to the original disclosure sought discovery apparently did not concern the court.

The court in *Grumman* failed to adequately consider the policies underlying the work product doctrine and instead blindly applied the majority rule on waiver. The decision unjustifiably limits the zone of privacy necessary for an attorney to effectively represent his client and substantially undermines the public policy of encouraging settlements.<sup>813</sup> Under *Grumman*, an attorney will be faced with a dilemma. If he wants to avoid present litigation, he may risk waiver in future actions by disclosing work product documents during settlement negotiations to

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<sup>808</sup> See *supra* notes 771-72 and accompanying text.

<sup>809</sup> 91 F.R.D. 84 (E.D.N.Y. 1981). In *Grumman*, Titanium, the defendant, was involved in a price fixing scheme that had caused damages to the Department of Defense (DOD) and several corporations including Grumman. To facilitate the negotiations (which eventually led to settlement) between Titanium and the DOD, Titanium supplied the DOD with work product documents. The DOD used these documents to produce a report on the effects of Titanium's price fixing scheme. The DOD gave Titanium a copy of the report and they agreed that if future litigation ensued, the report could not be used. Grumman, in its litigation against Titanium, sought discovery of the report from the DOD. Both Titanium and the DOD tried to prevent discovery on the basis of work product immunity.

The court in *Grumman* held that because Titanium and the DOD had agreed not to use the report in the event of future litigation, the report was not prepared in "anticipation of litigation" and therefore was not work product. *Id.* at 90. Alternatively, the court, following the majority rule on waiver, held that the DOD's disclosure of its report to Titanium constituted waiver. *Id.*

<sup>810</sup> *Id.* at 90.

<sup>811</sup> See *supra* note 770 and accompanying text.

<sup>812</sup> 91 F.R.D. at 90 (citing *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974)). The *Burlington* case is readily distinguished from *Grumman*. In *Burlington*, disclosure during negotiations was made to the *same* adversary who later sought discovery on the basis of waiver.

<sup>813</sup> See *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 45 (D. Md. 1974) ("Public policy requires the courts to encourage the voluntary settlement of civil controversies.") (citations omitted); cf. *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972) :

I reject the notion that a party waives its privilege if its lawyer, bargaining on its behalf, contends vigorously and even in some detail that the law favors his client's position on a point in issue . . . . Bargaining, like litigation itself, partakes of the adversary procedure. Negotiated settlements are to be encouraged, and bargaining and argument precede such settlements. Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive [their privilege].

strengthen his bargaining position. If, on the other hand, the attorney prefers to protect work product for future suits, he may risk increasing the likelihood of present litigation by not disclosing work product material and continuing to bargain from a weakened stance in pending settlement efforts. Thus, in the former case, an attorney may be penalized in the future for his legitimate adversary conduct in the present, and in the latter case an attorney may be forced into unnecessary litigation with a present, weak adversary who might have settled, in order to protect documents in future litigation from a strong adversary.

Providing an attorney a zone of privacy so that he may effectively represent his client is a basic tenet of the work product doctrine.<sup>814</sup> Discovery should be denied unless an adversary seeking disclosure can show that disclosure to a prior adversary created some basic unfairness.<sup>815</sup>

#### 4. *Conclusion*

The proposed formulation, in conformity with the conclusions of courts and commentators, suggests limiting waiver of protection of work product materials to those situations in which a party has made a testimonial use of such materials and the rules of evidence apply. Not applying waiver to the situation where work product is disclosed to third parties in preparation for civil actions will avoid wasteful and costly litigation and will ensure that the work product doctrine continues to protect the integrity and vitality of the adversary system.

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<sup>814</sup> See *supra* note 733 and accompanying text.

<sup>815</sup> See *supra* notes 803-04 and accompanying text.